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No. _____

In The

Supreme Court of the United States

October Term, 1993

PREFERRED COMMUNICATIONS, INC.,

Petitioner,

vs.

CITY OF LOS ANGELES and DEPARTMENT OF WATER & POWER,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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291 pp

QUESTIONS PRESENTED

The evidence below showed that cable operators, acting as electronic publishers, present multiple video programming services by means of a common carrier service known as "pole attachment service." The pole attachment service is provided by public utility companies using their own facilities, including easements and rights-of-way over both municipal and private property. The questions presented are:

1. Do municipalities have the right to erect tollgates across public utility-owned easements and rights-of-way for the purpose of limiting, preventing, or conditioning publication by cable television companies whose wires and facilities are not placed on municipal rights-of-way?

2. In light of the fact that cable operators use a public utility common carrier service to provide programming, may a municipality, consistent with the free speech and press rights guaranteed by the First Amendment and the California Constitution, deny cable operators the right to publish electronically by the device of requiring contractual franchises issued on a limited basis subject to discretionary conditions?

3. May a municipality, consistent with the free speech and press rights guaranteed by the First Amendment and California Constitution, arbitrarily select a portion of the press which does not need or use municipal streets and rights-of-way, from among the various members of the public subscribing to public utilities services, and assert the power to deny, limit, or condition the right to speak and publish by cable television pursuant to standardless criteria?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

Preferred Communications, Inc. (hereinafter "Preferred")[1] filed a complaint against the City of Los Angeles and the Department of Water and Power ("DWP") on September 9, 1983, which the United States District Court for the Central District of Los Angeles dismissed in an unpublished memorandum dated March 9, 1984. The Court of Appeals for the Ninth Circuit overturned the district court's dismissal. 754 F.2d 1396 (9th Cir. 1985) (hereinafter *"Preferred I,"* A 1[2]). The City appealed to this Court, which affirmed the Ninth Circuit's decision on narrower grounds, and remanded the case. 476 U.S. 488 (1986) (hereinafter *"Preferred II,"* A 43).

On remand, after Preferred had amended its complaint, the District Court issued several orders on motions for partial summary judgment (*see, e.g.*, A 76, 126), and on April 11, 1991 entered judgment in favor of Preferred on certain claims and in favor of the City on others (*see,* A 72). Cross-appeals were filed, and the Court of Appeals for the Ninth Circuit issued its opinion on January 7, 1994, remanding the matter. 13 F.3d 1327 (hereinafter *"Preferred III,"* A 53).

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[1] Pursuant to Rule 29.1, Preferred states that it has no parent or subsidiary companies.

[2] Copies of the earlier appellate decisions in this litigation are set forth, with parallel citations, in the Appendix for the convenience of the Court.

JURISDICTION

The amended complaint contained claims asserted under 42 U.S.C. §1983, 18 U.S.C. §1961, *et seq.*, 15 U.S.C. §§1 and 2, and two state law provisions. The District Court had jurisdiction pursuant to 28 U.S.C. §§1331, 1343, 2201 and 2202, 18 U.S.C. §1964, and its pendent jurisdiction. Jurisdiction of the Court of Appeals was pursuant to 28 U.S.C. §1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The following are quoted in the Appendix: United States Constitution, First Amendment; California Constitution, Art. I, §2; 47 U.S.C. §224 and §541; California Public Utilities Code §762, §762.5, §767, §767.5, and §7901; and City of Los Angeles Administrative Code §13.1, *et seq.*

STATEMENT OF THE CASE

When Preferred was last before this Court, it argued that, contrary to conventional wisdom, cable television does not need or use any special franchise to utilize municipal streets for the operation of its business, and that it was a violation of Preferred's First Amendment rights to require the cable television company to submit to the municipality's policy that limits access to the market by the device of requiring submission to contractual franchises that are discretionary and standardless.

Licenses should be issued as a matter of right and regulations should be within the limits of municipal police power. This Court found that "cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspa`er and book publishers, public speakers, and pamphleteers." *Preferred II*, 476 U.S. at 494. The Court went on to note that:

> Of course, the conclusion that respondent's factual allegations implicate protected speech does not end the inquiry. . . . We do not think, however, that it is desirable to express any more detailed views on the proper resolution of the First Amendment question raised by respondent's complaint and the City's responses to it without a fuller development of the disputed issues in the case. We think that we may know more than we know now about how the constitutional issues should be resolved when we know more about the present uses of the public utility poles and rights-of-way and how respondent proposes to install and maintain its facilities on them. (*Id.* at 495.)

The record sought by this Court is now available and it demonstrates that cable television does not use municipal streets and rights-of-way any more or any differently than any other member of the public does, or any other consumer of public utility services does, such as residents using home electricity or a bookstore using ordinary telephone service, or a grocery store responding to telephone requests for home deliveries. The record demonstrates that cable television uses and pays a regulated price for a

service provided by public utilities called "pole attachment service"; that public utility facilities have no shortage of capacity for the provision of multiple pole attachment services; that there is no significant societal interest injured by open access to this common carrier communication service as a matter of right for multiple video program providers; and that the preservation of the municipal franchising mechanism, as practiced by the City of Los Angeles, inhibits competition in the provision of news, entertainment, and information, contrary to the policies of the State of California and the federal government, all in violation of the state and federal constitutions.[3]

The Nature of Cable Television – Cable television uses a system of wires and/or optical fiber to purvey its news, information and entertainment. It is not a public utility. It is a member of the press. *Preferred II*, 476 U.S. at 494; *Television Transmission v. PUC*, 47 Ca1.2d 82, 88 (1956); *Weaver v. Jordan*, 64 Ca1.2d 235, 242-49, *cert. denied*, 385 U.S. 844 (1966). It is a consumer of a public utility, common carrier service. Cal. Pub. Util. Code §767.5.

Pursuant to that service, cable television wires are supported by or are contained in public utility structures located on public utility-owned rights-of-ways. The placement of cable television's wires, fibers and other

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[3] In light of the constitutional impact of the factual material, this Court may independently consider the factual record in full. *See, Bose Corp. v. Consumers Union*, 466 U.S. 485, 510-11 (1984); *Harte-Hanks, Inc. v. Connaughton*, 491 U.S. 657, 688, 693 (1989); *Houston v. Hill*, 482 U.S. 451, 458, n.6 (1987).

appurtenances in the communication space of poles, conduits, trenches and other structures of public utilities is regulated by the Public Utilities Commission ("PUC") of the State of California pursuant to Cal. Pub. Util. Code §767.5 (access to poles, and rates); Cal. PUC General Order No. 95 (aerial safety); Cal. PUC General Order No. 128 (underground safety); and Cal. Pub. Util. Code §762.5(c) and (d) (environmental matters and aesthetic issues). (*See also,* A 229-234.)

The pole attachment service provided by the public utilities through the use of their facilities is a dedicated public utility service and is recognized as such by statute. Cal. Pub. Util. Code §767.5(b).[4] When that pole attachment service is provided on poles where the public utility easements cross private property, the California courts have made it clear that the attachment of the wires and facilities of the cable television operator to poles located

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[4] "The Legislature finds and declares that public utilities have dedicated a portion of such support structures to cable television corporations for pole attachments in that public utilities have made available, through a course of conduct covering many years, surplus space and excess capacity on and in their support structures for use by cable television corporations for pole attachments, and that ***the provision by such public utilities of surplus space and excess capacity for such pole attachments is a public utility service delivered by public utilities to cable television corporations.***" (*Ibid.*; emphasis added.)
Dedication is the offering or holding out of facilities for public use, for the performance of a public service on a "come one, come all" basis. It is a central concept to public utility regulation.

in backyard easements dedicated to public utility services is within the scope of such easements and does not constitute trespass; and that the placement and maintenance of cable television wires in those circumstances does not require the consent of the private property owner and does not entitle the private property owner to additional compensation. *Salvaty v. Falcon Cable Television*, 165 Cal.App.3d 798, 801-805 (1985), citing Cal. Pub. Util. Code §767.5(b). The pole line which crosses over such backyard easements also crosses over municipal streets when it comes to the end of the block, moving along easements also owned by the public utility over those streets.

Typically the public utilities whose facilities are used by cable operators are those supplying either energy or telephone service. (*See, e.g.*, A 235.) In California, electric, gas, water, and sewage public utilities obtain easements and rights-of-way over and along public streets from local governments pursuant to franchises which provide for compensation to local government. Telephone and telegraph companies, on the other hand, obtain the rights to use all public rights-of-way from the state government.[5]

Pursuant to the provisions of Cal. Pub. Util. Code §767, the pole-using public utilities, including Pacific Bell and DWP, have entered into agreements for the joint use of poles. Substantially all poles are installed so as to provide "electricity space" at the top of the poles and

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[5] Cal. Publ. Util. Code §7901. *See also, Pacific Tel. & Tel. Co. v. City of San Francisco*, 51 Ca1.2d 766 (1959). The telephone and telegraph companies may be required to pay ad valorem taxes to local governments. *Id.*

"communication space" lower down, but above the "clearance space" required above the ground. (A 232-33.) Where the poles used for pole attachment service are owned solely by the telephone company, or are owned jointly by that company and the power company, the cable company obtains pole attachment service from the telephone company because it is the entity which controls access to the communication space of the particular structure. (A 231-32.)[6] As part of their service dedication, the Bell system telephone companies developed and published rules, regulations and standards for pole attachments which are used throughout the industry. The publication, known as the "Blue Book," specifically provides for pole attachment service to multiple cable companies.[7] (A 230-31; CR 113, Exh. 1.)[8]

The power and telephone utilities in the portion of the City of Los Angeles involved here are substantially all located on jointly-owned utility poles. A cable television company desiring to obtain the benefit of such pole attachment service must agree with the utility company to a series of conditions designed to protect the integrity

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[6] To the extent the pole is solely owned by the power company, the cable company obtains the service directly from the applicable power company. (A 232.) The DWP pole attachment agreement (CR 468, Exh. 6) is substantially the same as the Pacific Bell (or Pacific Telephone) pole attachment agreement (CR191, Exh. 2, filed herewith as A 197).

[7] Utility companies other than Pacific Bell follow similar pole attachment procedures. (A 230-31.)

[8] References to "CR" or the "Clerk's Record" are included for the convenience of the Court, should the Court choose to review parts of the factual record not included in the Appendix.

of the poles and the utility facilities placed there. (A 197.) For example, by written agreements required before service is provided, a cable television company must first provide public liability insurance and surety bonds to assure that it meets in every way its obligations to the utilities, including, among many others, the removal of any abandoned cable television wires or fixtures. (A 207-08.)

After providing evidence of insurance and bonds, cable operators then arrange for the inspection of each and every pole or facility to be contacted, and submit engineered plans for any rearrangements required of those facilities. After this engineering work has been completed and approved by the public utility, the cable television operator then pays in advance the cost of doing whatever rearrangements or pole replacements are required to make certain that there is adequate surplus space for the attachment of the cable company's facilities. This can include paying for the cost of a total replacement of the pole or the purchase by the telephone utility from the power utility of additional space on the pole so that it can be used to provide the pole attachment services to the cable operator. (A 201, ¶6(a); A 230-31; A 248, 249.)

After a utility has received its required bonds and evidence of insurance, has approved the engineering plans, has received payment for the cost of make-ready, and has completed the make-ready work, the wires and

fixtures of the cable company are installed on or in the surplus space of the utility facilities.[9]

If, during that process, there is any need to temporarily interfere with the public's use and enjoyment of public facilities, a new and separate permit must be obtained from the municipality.[10] Such a permit is available only after plans are approved and bonds and appropriate evidence of insurance are submitted to the proper local authorities. These traditional municipal permitting processes are designed to protect the public's facilities and their use. Ironically, unless one is a prospective cable television company denied a franchise and prohibited from operating without such a franchise, any member of the public – whether a utility, a builder or a private citizen – can obtain such permits for any reasonable

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[9] Utility poles used for power and telephone service are constructed tall enough, strong enough, and numerous enough (about 40 poles to the mile) so as to be able to support relatively light and dangerous power lines at the upper levels – the power space – and quite heavy copper telephone cables in the communication space. Traditional twisted pair copper telephone cable weighs pounds per foot and has diameters measuring to several inches. By comparison, coaxial cable used by cable television companies weighs ounces per foot and is always less than one inch in diameter. Both cable companies and telephone companies are replacing their wire facilities with fiber optic strands which are a fraction of the size of copper and coaxial cables.

[10] *See, e.g.*, CR 114, Exh. K at §3.1(e):

> "This franchise does not relieve the Grantee of any requirement . . . of any ordinance, rule, regulation, or specification of the City, including, but not limited to any requirement relating to street work, street excavation permits, or the use, removal or relocation of property in streets."

purpose. A franchised cable operator must also secure such permits, but can only do so after a "franchise" has been granted by the city.

After the cable operator's facilities are installed, should the space on any particular pole or other facility be needed by the pole owner, and thus no longer be "surplus space," the cable operator must either remove its wires and appurtenances from the subject facility, or pay the cost of increasing its capacity (*e.g.*, by installing a taller pole), thus creating new surplus space. (A 201, ¶6(b); A 249.) In the unlikely event that adding more surplus space is too difficult or expensive, the cable company may elect to place its wires and appurtenances underground in the utility's rights-of-way, at its own expense. (A 231; A 242-43.)

At every stage of construction and maintenance, the cable operator's facilities are subject to inspection and regulation by the PUC (pursuant to General Orders No. 95 and No. 128) and by the several public utilities' enforcing their regulations concerning pole attachment services. (A 233.) The supervision and control in the latter case is at the expense of the operator, paid to the utility. (A 206, ¶15.)

In no event does one, two, or more cable operators ever consume or threaten to consume all available space on or in the poles, conduit, trenches or rights-of-way involved.[11] It is, of course, likely that a second or third

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[11] A 248-49. There is no practical physical limitation to "surplus space" on the poles, since a "rearrangement" of the cables on the poles can include the installation of a longer pole (Cal. Pub. Util. Code §767.5(a)(8)), adding four to five additional feet of communication space. (A 248-49.) Moreover, room

operator may have a greater cost of "make ready". Poles come in five foot increments, and forty-five foot poles cost more than forty-foot poles. Underground construction costs more than aerial construction. The second, third, and each succeeding cable operator (unlike the utilities themselves, who are entitled to demand that cable operators rearrange their facilities at no expense to the utility) may have to pay more to rearrange his predecessor's wires or fittings on poles, or to hand-dig around or under his predecessors' underground facilities. These are economic decisions comparable to those made by other publishers.

The City's Process for Control Over the Cable Medium – The City of Los Angeles (hereafter "City"), contrary to the First Amendment; Art. I, §2 of the California Constitution; and *Television Transmission v. PUC, supra,* decided to use the provisions of its charter dealing with the franchising of public utilities to control cable television companies' access to the citizens of Los Angeles. (CR 114, Exhs. C-E.) The City chose to limit to one the number of cable operators for any area and to use a semi-auction process to choose which cable operator it would permit to provide programming to residents in any given area.[12]

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for additional cables in existing space can be made via use of brackets and cross-arms. (A 233-34.)

[12] Forcing cable operators to compete for the highly lucrative monopolies provided the city officials with a source of power – and revenues – they would not otherwise have had. Many commentators have described the resulting "politicizing" of the selection process. *See, e.g.,* Emord, *Freedom, Technology and the First Amendment* (1991), at 265 (footnotes omitted):

> "Typically, franchising results in the selection of one franchisee whose operation within a specified

Sometime prior to 1979, the City divided the Los Angeles market into sections and set out to create a series of press monopolies, thus prohibiting the operation of a cable television system within the City absent a city-granted contractual franchise.[13]

The City issues a cable television authorization only by conducting a "Notice of Sale/Request for Proposal" (hereinafter "NOS/RFP") auction process originally designed to sell utility franchises to the highest bidder. A cable television operator desirous of operating in the City has to first somehow persuade the appropriate City Board to draft an NOS/RFP document.[14] Assuming that

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> geographic area is afforded monopoly protection by the local authorities. Nationwide, the franchising process has been besmirched by scandal, political cronyism and vote-selling, illicit deals, and extortion."

See also, id. at 266-268; Lee, *Cable Franchising and the First Amendment,"* 36 Vand. L. Rev. 867, 871-72 (1983); Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise,* 134 U. Pa. L. Rev. 1335, 1358-361 (1986); Bolick, *Cable Television: An Unnatural Monopoly,* No. 34, Cato Inst. Policy Analysis, March 13, 1984.

[13] By so doing, the City took control over both initial and renewal access to the market, collected fees in excess of the costs of any municipal services provided, demanded and collected fees and free facilities and services in exchange for the favor of that access, created a further source of campaign financing, and – at the same time – protected itself from unfavorable scrutiny by the press using this new technology. *Cf., Pacific West Cable Co. v. City of Sacramento,* 672 F.Supp 1322, 1349-52 (E.D. Cal. 1987).

[14] Presumably, the Ninth Circuit's mandate that the City begin another NOS/RFP process for the South Central area will eliminate or, at least, lower this first hurdle. However, that court's failure to provide any standards for the process, and the City's decade-long denial of Preferred's request for a franchise,

the City is persuaded to begin the NOS/RFP process, it then devises a NOS/RFP document which contains various minimum requirements, terms and conditions for the cable franchise for the particular geographic area involved. The City's utility ordinance (L.A. Admin. Code §13.1, *et seq.*) sets out some requirements to be included in every NOS/RFP and contains various procedural requirements, but, by and large, the specifications are left solely to the discretion of the City, and each NOS/RFP document contains different terms and conditions. (CR 114, Exh. A at 23, 28.) Only one franchise is issued as the result of each NOS process.[15]

As part of the cable selection process, the City demands that all prospective cable operators reveal exactly what programming they propose to provide.[16] The operators are also required to reveal their proposals for any programming they intend to produce themselves, including a declaration as to their "local programming philosophy specifically describing plans and objectives

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lead Preferred to believe that nothing else in the City's procedures will change.

[15] Because of the NOS/RFP's nature – an auction with only one possible "winner" – the "proposals" of other cable operators become *de facto* requirements along with the specifically enumerated "minimum requirements" in the document itself. In other words, the ultimate "minimum requirement" to engage in speech is the out-bidding of all other applicants.

[16] CR 114, Exh. J at iv and Form J ("Proposed Signal Carriage and Channel Allocation"); CR 198, ¶14; CR 303, Exh. HH at 114-17, 134-54.

for access and local origination".[17] The City then assesses the programming to be offered.[18] Having learned about all of the potential speakers' programming plans, the City may then select the one speaker it likes best;[19] or it may elect not to allow any company to enter the business.[20] If it does select a favored applicant, "negotiations" may occur even after City selection.[21]

The cable authorization ultimately issued by the City is in the form of a "franchise contract," giving the City power to pursue both contractual and regulatory remedies.[22] The City controls the programming actually provided by making the operator's responses to the NOS/RFP a contractual commitment.[23] The City also retains control over renewal (or lack thereof) of the franchise. (CR 303, Exh. HH.)

The Formation of Preferred Communications – In 1983, over a decade ago, Preferred first sought the right to publish by cable in Los Angeles. (CR 191, ¶10.) It asked

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[17] CR 114, Exh. J, Form K, Q.6.

[18] CR 192, Exh. 12 at 179-183 and 240-257.

[19] CR 114, Exh. A at 27.

[20] The City may simply decide that none of the proposals received is "adequate[ly] responsible", and decline to issue any franchise. (CR 114, Exh. A at 18-19.)

[21] CR 114, Exh. A at 17, Exh. K at 1 (introductory language); CR 303, Exh. HH at 7 (franchise renewal).

[22] CR 114, Exh. I at 7, Exh. J at iii; CR 468, Exhs. 16-22, 26-27, 39, 42-43.

[23] CR 114, Exh. H at section 7(c). The contractual process is used by cities to finesse the lack of police power authority for many of the demands being made.

for no exclusive authorization, nor did it seek any contractual rights from the City.[24] Rather, it simply sought to offer cable television service to willing residents of South Central Los Angeles, using plant constructed on public utility facilities pursuant to the common carrier, aesthetic and safety jurisdiction of the PUC, and complying with all applicable public works permitting requirements of the City.[25] Although Preferred expressly committed to obey all reasonable police power regulations, its requests were to no avail.

The City's refusal to issue authorization (*i.e.*, a "francise"[26]) stands as an absolute bar to Preferred's engaging

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[24] CR 191, ¶10. This request has been repeated on many occasions. (CR 191, ¶¶11-14; CR 114, Exhs. F, G; CR 453, Exh. 55.)

[25] As set forth *supra*, California PUC's General Orders No. 95 and No. 128 regulate safe construction and maintenance of cable facilities. (The PUC's safety standards apply to municipally-owned utilities such as the DWP as well as to privately-owned utilities. *Polk v. City of Los Angeles*, 26 Cal.2d 519, 539-541 (1945).) In addition, the pole attachment contracts with Pacific Telephone and with DWP contain bonding and insurance requirements for aerial construction and maintenance. As to underground placement of wires, the City's existing public works permitting procedures require a bond to protect the City. City-franchised cable operators are required to comply with such permitting procedures. (CR 114, Exh. K at §3.1(e).) Preferred has not challenged any of these requirements.

[26] *See*, 47 U.S.C. §522(9):

> "[T]he term "franchise" means an initial authorization, or renewal thereof . . . , issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system."

in cable television activities. (L.A. Admin. Code §13.62; A 203, ¶9; CR 197, ¶7.)

The Lower Courts' Review of the 1982 NOS/RFP for South Central Los Angeles – A number of the provisions of the City's 1982 NOS/RFP for the South Central area were the subject of particular examination by the district court. The court broke down the provisions into numerous "requirements" and addressed them individually.[27]

The heart of the City's scheme – the foundational decision upon which all other demands and conditions are built – is the City's franchise policy to limit access to the market. The trial court labeled this the "one area/one operator" requirement. The 1982 NOS/RFP, like all other NOS/RFPs the City has conducted, was designed to result in one, and only one, selected prospective cable speaker to receive a franchise. While, technically, the City retains the ability to issue additional franchises, it did not intend to, does not want to, and has never done so. The

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[27] The district court struck down requirements dealing with "mandatory access/leased access channels," "equipment and service," "character," "state-of-the-art," "option [of City] to buy," "uninterrupted service," "term of years," "filing fees and 'good faith' deposit," and the "Cable Franchise Advisory Board." (A 72-73.) The district court found the following requirements to be constitutional: "universal service," "localism," "prohibition of transfer" without consent, "franchise fees," "free access" to cable facilities for the City, "recourse and indemnity," "financial and technical qualifications," "customer service," and "inspection of property and records." (A 73-74.)

trial court invalidated the monopoly policy, but incongruously, ***left in place the process designed to accomplish that result.***[28]

On appeal, the Court of Appeals for the Ninth Circuit affirmed the lower court's ruling invalidating the City's one area/one operator policy. However, like the trial court, the Court of Appeals failed to overturn the contractual franchise process which had been developed by the City as the means of controlling this form of the press. Rather than instructing the City to devise generally applicable regulations and conditions which could be uniformly applied to all cable operators who are willing to operate in a competitive environment – as it should have done under its own ruling in *Preferred II* (754 F.2d at 1409) – the Court of Appeals has instead instructed the City to set up yet another discretionary auction process, similar to the one Preferred has now been challenging for over a decade, in which Preferred and any other interested cable operator must "bid" for the right to present programming services to the residents of South Central Los Angeles. *Preferred III*, 13 F.3d at 1334. Thus, the court has allowed the City to continue in its role as gate-keeper, controlling First Amendment speakers' access to easements and rights-of-way possessed by others.

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[28] Both the City's need for – and its excuse for – intrusive regulation of its cable monopolists would disappear if the City were to open the market for competition.

REASONS FOR GRANTING THIS PETITION

The Present Case Offers the Necessary Record to Allow Formulation of a National Policy in an Area of Substantial Interest and to Settle an Important Question of Federal Law

This Court can and should provide authoritative guidance in an area of continuing tension between the exercise of municipal police powers and the exercise of First Amendment rights by cable television operators. This Court now has a factual basis on which to analyze the problem of how a city's actions as the gate-keeper to utility poles and utility easements inhibits the electronic press from contributing to the commerce of ideas.[29]

Cable television systems have expanded so greatly in the past few years that an estimated 98% of American homes now have access to those services. Industry statistics show that over 55 million households – 62.4% of households with television sets – presently subscribe to cable television services. (*Broadcasting & Cable*, January 3, 1994, at 64.) What sets cable television apart from other forms of media is its ability, with a multiplicity of channels, to transmit a choice of programs to its audience, including direct observations of governmental processes

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[29] Congress has recognized that "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media," (H.R. Rep. No. 862, 102d Cong., 2d Sess. (1992) at 2.) Cable legislation passed in 1992 states that "a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise." 47 U.S.C. §541(a)(1).

and decision-making. While C-SPAN – with its commentary on and coverage of the activities of Congress – springs to mind, the average citizen does not find similar coverage of local governmental activities. But for the fact that the local government controls both the opportunity to begin publishing and the power to continue publishing, interested citizens could, by turning to their home screens, observe the entirety of their local city council's debates and votes, accompanied by critical commentary. The immediacy of the coverage by the cable press could revitalize the concept of a town meeting. But none of that will happen where the city officials, whose activities should come under scrutiny, control whether or not the cable system will be allowed to operate, and if so, for how long.

The selection of which cable operator will be permitted to operate, or continue to operate, generally involves governmental officials in numerous arbitrary and subjective decisions. This is surely true here: the City decides whether or not even to "initiate" a particular NOS/RFP process; decides what minimum requirements and conditions to include, and what "goals" and "standards" to use in comparing responses; and selects the one applicant it decides is "best" or "most responsive" – using "standards" which are too vague and subjective to pass constitutional muster.[30] Generally, as in Los Angeles, ***no***

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[30] This lack of objective, neutral criteria clearly invalidates the Los Angeles NOS/RFP process under *Lakewood v. Plain Dealer*, 486 U.S. 750, 760 (1988). In that case, the Court described two major First Amendment risks associated with the lack of concrete standards: the possibility of self-censorship and the difficulty in detecting or correcting content-based censorship

guidelines for, or limitations upon, any of these exercises of discretion exist,[31] and the Court of Appeals below

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without standards by which to measure the licensor's action. *Id.* at 759. The Court noted that the Constitution does not permit any presumption that municipal officials will act in good faith. *Id.* at 770.

The First Amendment concerns articulated in *Lakewood* are directly applicable to the City's NOS/RFP procedure. The process explicitly requires disclosure of all proposed programming. *Lakewood*, 486 U.S. at 760 (licensing scheme at issue "not as direct a threat to speech as a regulation allowing a licensor to view the actual content of the speech to be licensed or permitted . . . "). Moreover, the criteria used change from NOS to NOS; they are "shifting . . . , making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *Lakewood*, 486 U.S. at 758. (Although the district court found that local ordinance 58,200 (L.A. Admin. Code §13.1, *et seq.*) and Cal. Gov't Code §53066 set forth "general standards applicable to all franchise applicants" (A 159), those enactments provide only a tiny fraction of the "requirements" and "objectives" contained in any given NOS/RFP document.) Finally, self-censorship dangers are readily apparent: a franchise applicant is quite unlikely to propose a weekly program exposing local political shenanigans.

[31] For example, in the 1982 NOS/RFP, the City specifically noted that it was not including "stringent requirements" in the document itself; instead only "guidelines and overall objectives" were included. (CR 114, Exh. I at 5.) The City described its own evaluation process as follows:

> "Franchises are awarded after thorough analysis and evaluation of franchise bid proposals on various factors, including financial resources, financial pro formas, system design, service and rates, community programming, facilities and equipment, employment practices, and performance in other jurisdictions. Based on these evaluations, the City selects the bidder who in its judgment demonstrates the best overall

declined to provide any. Moreover, the selection is generally made, as it was in Los Angeles, only after the disclosure of all proposed programming.

In *Preferred I*, the Ninth Circuit initially addressed this precise issue and ruled that the franchise auction process "creates a serious risk that city officials will discriminate among cable providers on the basis of the content of, or the views expressed in, their proposed programs." 754 F.2d at 1406; *see also, id.* at 1406-07 and 1409. At that point, the Court of Appeals reached the heart of the First Amendment issue:

> [T]he City must content itself with uniformly applying to all applicants regulations tailored to minimize the burden on public resources and granting franchises to all cable operators who are willing to satisfy the City's legitimate conditions. (*Id.* at 1409.)[32]

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capability and willingness to provide a high quality cable communications service to the residents of the franchise service area." (CR 114, Exh. A at 26-27.)

The "various factors" are simply jumbled together in a decision as to which applicant is "best". (*Id.*) No explanation of the ultimate decision is required, and meaningful judicial review is impossible. (Even those few requirements which ***are*** objectively stated may be waived in the discretion of the City without explanation or even notification. (CR 114, Exh. A at 23-24.))

[32] At least one municipality has done just that. The City of Sacramento, following a trial challenging a similar auction-type franchising process, revised its method of licensing cable operators and now employs a generally applicable licensing ordinance. The ordinance sets forth certain requirements applicable to all cable operators interested in providing programming to the residents of the area. Any operator willing to abide by the

The current decision by the Ninth Circuit in *Preferred III* to back away from its position in *Preferred II* is indefensible, and should be corrected by this Court.[33]

The franchising process patently raises deep concerns about governmental control of viewpoint. However, there is additional undesirable fallout of the process. For example, the machinery by which local government creates for itself the opportunity to choke off access to the market by establishing a tollgate, as it were, is a breeding ground for political abuse. Once such tollgates are established, it becomes apparent to the cities that the value of their control over the market – the "take" from the tollgate –

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requirements can obtain a license from the city. (*See*, CR 468, Exh. 25; *Pacific West Cable Co., supra*, 672 F.Supp. at 1329 and n.5.)

[33] Moreover, the "contractual" nature of the process approved by the Ninth Circuit is not an appropriate exercise of police power regulation. Essentially, the City is negotiating with those to be regulated and then exercising legislative policy through an offer and acceptance mechanism. Requiring Preferred to now take part in such a process, over 10 years after it began seeking the right to publish, will result in further unnecessary – and baseless – delay, and may only result in yet another challenge, by Preferred or others, to the City's process of precluding speakers.

> "It might well be a different case if [the City] had enacted an ordinance articulating qualifying criteria for cable companies to do business in the City, with such other regulations as the City government might believe to be necessary and proper in the exercise of police power, and then to confront the contention that such an ordinance [is unlawful]."

Community Communications v. City of Boulder, 485 F.Supp. 1035, 1039 (D. Colo. 1980), *rev'd*, 630 F.2d 704 (10th Cir. 1980), *rev'd*, 455 U.S. 40 (1982).

will be increased by limiting access to the market and by maintaining the power to cancel that access:

> The most problematic political cost of regulation springs from the incentive for public authorities to create durable monopolistic profit opportunities . . . The bids [for the franchises] will only partly be paid as cash payments to local government coffers; they are also paid through campaign contributions, offers of free program time and use of production facilities to influential interest groups, advantageous equity offerings to political supporters of key legislators, and an overinvestment in non-renumerative cable services. (Hazlett, *Private Monopoly and the Public Interest, supra,* 134 U. Pa. Law Rev. at 1358-59 (footnotes omitted).)[34]

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[34] Examples abound. In the bidding process for the East San Fernando Valley franchise – another Los Angeles franchise – direct political campaign contributions from six cable companies totalled over $300,000. *Id.* at 1360 n.87. In that same battle – as in the instant case and elsewhere across the country – "rent-a-citizens" were hired, *i.e.,* prominent local citizens given stock in the company that will operate the franchise, usually at low rates (or for free), in exchange for political influence. *Id.* at 1360 and n.87. Outright extortion has occurred in some instances. *See, e.g., United States v. Kahn,* 340 F.Supp. 485 (S.D.N.Y. 1971), *aff'd,* 472 F.2d 272 (2d. Cir.), *cert. denied,* 411 U.S. 982 (1973); *Telepromp-ter of Erie, Inc. v. City of Erie,* 537 F.Supp. 6, 12-13 (W.D. Pa. 1981); *Multichannel News,* Dec. 10, 1984, p.2 (former mayor sentenced to prison for attempted extortion related to cable franchising); *Multichannel News,* May 6, 1985, p.11 (mayor indicted on bribery charges concerning cable franchise award).

Even "lawful" city demands can be outrageous. Twelve years ago, Baltimore demanded a 100-channel interactive system – technology highly unusual even today. *See,* Lee, *supra,* 36 Vand. L. Rev. at 873 n.32. In Denver, the cable company

In reality, however, the cities have no basis for collecting a toll from the cable operators, or acting as gatekeepers at all, since, as the record in this case shows, the easements and rights-of-way on which cable operators construct their facilities belong not to the municipalities, but to the utility companies – which are fully reimbursed for their use. Indeed, as noted *supra*, the State of California found the provision by such public utilities of space for pole attachments by cable television companies to be a "public utility service" to be provided in the interests of the people of California.[35] Cal. Pub. Util. Code §767.5(b).

The California statute is further reinforced by the provisions of the federal pole attachment statute. *See*, 47 U.S.C. §224 (part of the common carrier portion of the Communications Act, as amended by the Cable Communications Policy Act of 1984). The FCC regulates pole attachments by cable television operators throughout the country on all utility poles on which there is communications space, except in those states where, like California, the state itself has certified a state agency pursuant to FCC rules to regulate the cable television attachments

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eventually selected (after it had spent nearly $1 million in its lobbying and advertising efforts) had, in order to win the franchise, committed itself to supply double the channel capacity required to serve consumer demand fully, leading to a wasteful promised overinvestment costing approximately $8 million. Hazlett, *supra*, 134 U. Pa. L. Rev. at 1357 n.82.

[35] The fact that the City owns DWP is irrelevant to this analysis. DWP, like Pacific Bell, uses it facilities and easements to provide pole attachment services to all who have licenses from the City. DWP has clearly dedicated surplus space on its poles for cable television communications use.

itself.[36] The FCC is empowered to "regulate the rates, terms and conditions for pole attachments to provide that such rates, terms and conditions are just and reasonable." 47 U.S.C. §224(b)(1). While the Act does not ***require*** public utilities to allow access to their facilities to cable operators, it provides that once such access is permitted, *i.e.*, once the public utility voluntarily elects to dedicate a portion of its pole space to such communications use, then the provision of such use is subject to FCC regulation to ensure that it is fair and reasonable. *Cf., FCC v. Florida Power Corp.*, 480 U.S. 245, 251-53 (1987) (once public utilities voluntarily enter pole attachment leases with cable companies, FCC has authority to regulate the service).

Further, the fact that cable uses the pole attachment service of existing public utilities, provided by means of the easements dedicated to those public utilities, was recognized by the 1984 Cable Communications Policy Act. To the extent here pertinent, Section 621(a)(2) of the Cable Act (47 U.S.C. §541(a)(2)) provides:

> Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, ***and through easements,*** which is [sic] within the area to be served by the cable

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[36] *See* 47 U.S.C. §224(c). A state can regulate pole attachments itself only if it certifies to the F.C.C. that (1) it regulates the rates, terms and conditions for pole attachments, and has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments; and (2) in so regulating pole attachments, the state has the authority to and does consider the interests of the subscribers of cable television services as well as the interests of the ***consumers of the utility service*** (i.e., the cable operators).

> system and which have been dedicated for compatible uses . . . (Emphasis added.)

Cable television does not use or need to use city streets. The Los Angeles franchising process amounts to nothing more than a prior restraint on the press – a device used to create and maintain city-tamed cable monopolists.[37]

Moreover, the verity of Preferred's claims in this regard is demonstrated by, among other things, the City's position that it has the right to franchise, ***or refuse to franchise,*** a cable company even when that cable company operates only by the use of leased channel services furnished over telephone company-owned wires, and never places nor maintains any facility of any kind or character on, under, or above any "public" property (*e.g.*, where all the television transmission facilities are built and owned by the public utility and tarrified channel services are made available to the cable operator, much like private line services to homes or businesses). Note also, that the FCC's Video Dialtone Orders (under which a telephone company is permitted to build cable television

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[37] Even if one were to assume, *arguendo*, that cable television uses public rights-of-way because the utility easements are located across the same physical geography as the municipal rights-of-way, it is clear that the cities have dedicated such space to use by cable television operators and thus opened it as a public forum. *Cf., Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814-16 (1984). Of course, such a fiction would be comparable to a city offering to stack a chair atop someone already seated in a lounger, and then demanding rent for the use of the unneeded chair. Or perhaps, in this context, the city is offering to stack a second soap box on top of one already available to the speaker, so that the city can both charge for the boxes ***and control*** the speaker.

facilities and lease channels on said facilities to, among others, cable operators) point out that the utilities already possess rights-of-way over municipal streets, and therefore that cities cannot require "cable franchises" of either the utilities or the users of such public utility facilities.[38] Unfortunately, the FCC's orders as to Video Dialtone services entitle – but do not require – telephone utilities to dedicate channel space to would-be cable operators. Even if one were to assume such service was the equivalent of pole attachment service, no California telephone company has elected to make Video Dialtone services available.[39] Preferred, therefore, must press forward with this case in order to obtain access to Los Angeles viewers.

The importance of this Court's determining whether it is appropriate for municipalities to act as tollgates regulating cable operators' access to utility company structures and rights-of-way is particularly clear in view of the strong public policy favoring competition among

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[38] *See, Telephone Company – Cable Television Cross-Ownership Rules, Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry* (Release No. 91-334), 7 FCC Rcd. 300, ¶50 (1991). (The City's counsel of record, Miller & Holbrooke, has challenged the decision in *N.C.T.A. v. F.C.C.*, Case No. 91-1649 (D.C. Cir.), in an amicus brief filed on behalf of National Association of Telecommunications Officers & Administrators.)

[39] What would be the benefit, however – or even the logic – in federally preempting the local municipalities' ability to control the access of telephone companies or other utilities to the local video programming market, but leaving in force the municipalities' ability to control the access of cable operators to that same market?

programming providers. The federal government has asserted interests in "promoting competition in the video programming market and preserving diversity in the ownership of communications media." *Chesapeake and Potomac Telephone Co. v. U.S.*, 830 F.Supp. 909, 927 (E.D. Va. 1993). *See, also,* 47 U.S.C. §521(4) and (6) (purpose of statute to promote competition in cable communication); and H.R. Rep. No. 862, 102d Cong., 2d Sess. (1992) at 4.[40] Unfortunately, municipalities are not interested in competition among cable operators, but are instead "[f]earful of losing revenue sources and local control. . . . " (*Multichannel News,* February 14, 1994, p. 28, "Cities Worry About Telco Entry".) In view of the obvious ability of municipalities to tax cable television service,[41] it is suggested that the real fear of municipal officials is the loss of control over the press.

The record below shows that the cable plant of multiple additional cable operators can be added to the utility poles in Los Angeles through rearrangement work pursuant to PUC standards. (*See, e.g.,* A 248.) In litigation elsewhere, the federal government and a major telephone company came to the same conclusion, agreeing that competing cable systems can compete literally side by side. *Chesapeake and Potomac Telephone Co., supra,* 830 F.Supp. at 919 n.14. The trial court in that case found that:

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[40] "It is the policy of the Congress . . . to – (1) promote the availability to the public of a diversity of views and information through cable television and other video distribution media; (2) rely on the market place to the maximum extent feasible, to achieve that availability . . . "

[41] *See, e.g., Leathers v. Medlock,* 499 U.S. 439 (1991).

> [W]hile there may, at some point, exist an absolute physical constraint on the number of cables that could be strung along existing utility rights-of-way in order to service individual households, the number of cable operators that could simultaneously service a household is so large as to be infinite for purposes of First Amendment analysis. (*Id.*, at 919.)

Thus, there is no reason for a city to "choose" which cable operator – or which two cable operators – will be permitted to provide programming services via the public utility facilities within the city's borders. Any legitimate concerns that a municipality has can be accommodated with generally applicable ordinances dealing with safety and disruption issues.[42] Indeed, any other method of "selecting" which cable operators will be allowed to provide programming services runs afoul of First Amendment protections.

CONCLUSION

The City of Los Angeles has in place a subjective and discretionary auction process by which it controls access to the utility-owned structures and rights-of-way located in Los Angeles, and uses this process to deny its own citizens the benefits of competition in a significant portion of the press. The broader tragedy is that the municipal franchising process practiced by Los Angeles and most other municipalities deprives the cable medium of the freedom to report on the vagaries and foibles of local

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[42] *See*, note 32, *supra*.

bureaucrats and officials. This is particularly lamentable since cable is the medium most suited to provide such reporting by virtue of its technology. Cable television cannot perform the civic duty of providing political speech so long as its very right to exist is subject to the wiles and whims of local functionaries.

This Court should reverse the Court of Appeals to the extent that the decision below permits the City to employ an auction process to determine which operators should be permitted to provide cable television services via public utility facilities located in the City. Rather, the City should be directed to set uniform, clearly-delineated requirements, and to issue licenses to any persons wishing a license subject to those requirements. The Writ of Certiorari requested by this petition should issue to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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754 F.2d 1396

PREFERRED COMMUNICATIONS, INC., a California corporation, Plaintiff-Appellant,

v.

CITY OF LOS ANGELES, CALIFORNIA, a municipal corporation; and Department of Water and Power, a municipal utility, Defendants-Appellees.

No. 84-5541.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 7, 1984.

Decided March 1, 1985.

As Corrected May 20, 1985.

[754 F.2d 1399] Before SNEED, ANDERSON, and FERGUSON, Circuit Judges.

SNEED, Circuit Judge:

Preferred Communications, Inc. (PCI) brought an action arising under 42 U.S.C. § 1983 (1982) against the City of Los Angeles (the City) and the Los Angeles Department of Water and Power claiming a deprivation of rights protected under the First and Fourteenth Amendments, as well as violations of the federal antitrust laws, and various state law violations. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1337, 1343, 2201, 2202 (1982), and under its pendant jurisdiction. It found as a matter of law that the City's regulatory scheme did not violate the First Amendment rights of a prospective cable television operator and that the City was immune

from antitrust liability under the state action exemption established in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). Accordingly, the court dismissed PCI's complaint without leave to amend, pursuant to Fed.R.Civ.P. 12(b)(6).[1]

PCI appeals from this dismissal. As the district court dismissed PCI's federal claims without leave to amend, its decision is final and appealable. *See Whittington v. Whittington*, 733 F.2d 620, 621 (9th Cir.1984); *Conerly v. Westinghouse Electric Corp.*, 623 F.2d 117, 119 (9th Cir.1980). This court therefore has jurisdiction over PCI's timely appeal under 28 U.S.C. § 1291 (1982). We affirm the district court's decision insofar as it pertains to the plaintiff's antitrust claims and reverse its dismissal of the First Amendment claim.[2]

I.

STANDARD OF REVIEW

A decision to dismiss a complaint for failure to state a claim upon which relief can be granted is reviewable de novo. *Guillory v. County of Orange*, 731 F.2d 1379, 1381 (9th Cir.1984). In conducting this review, we must accept all material allegations in the complaint as true. *Berner v. Lazzaro*, 730 F.2d 1319, 1320 (9th Cir.1984). All doubts are

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[1] PCI also claimed two state law violations. These were dismissed without prejudice for refiling in state court.

[2] Briefs Amici Curiae on the First Amendment issue were filed by American Television & Communications Corp. and Home Box Office, Inc., jointly, on behalf of PCI and by the cities of Palo Alto and Menlo Park and the Town of Atherton, jointly, on behalf of the City.

resolved in favor of the plaintiff. *Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 834-35 (9th Cir. 1980). A dismissal cannot be upheld " 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Id.* at 834 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957)); *accord Halet v. Wend Investment Co.*, 672 F.2d 1305, 1309 (9th Cir.1982). With these principles in mind, we turn to PCI's complaint.

II.

THE COMPLAINT

As alleged in PCI's complaint, the pertinent facts appear as follows. PCI is a corporation which was organized for the **[754 F.2d 1400]** purpose of operating a cable television system in an area of Los Angeles designated by the City as the South Central District. PCI's intended operation entailed the installation of a network of distribution cables in the region PCI wished to serve. PCI proposed to attach its cable to existing public utility facilities – poles and conduits located on property owned in fee by the utility and on or under easements owned by the utility running over both public and private rights of way.

For a number of years, utilities throughout the State of California have dedicated surplus space on their facilities for similar uses. The California legislature recognized this dedication, at least with regard to non-municipal utilities, when it enacted Cal.Pub.Util.Code § 767.5(b) (West Supp.1984) (dedicating surplus space and excess capacity on public utility support structures for use by

cable television companies). Accordingly, PCI approached two utilities in the Los Angeles area – the Pacific Telephone and Telegraph Company and the Los Angeles Department of Water and Power – to negotiate a lease of space on those companies' poles and conduits. Both utilities informed PCI that such an agreement would not be possible until PCI obtained a cable television franchise from the City. PCI then petitioned the City in an attempt to obtain such a franchise.

The City allocates franchises through an auction process. Franchising or licensing the construction of a cable television system is authorized by Cal.Gov't Code § 53066 (West Supp.1984).[3] The City requires companies wishing

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[3] On October 11, 1984, Congress enacted the Cable Communications Policy Act of 1984, Pub.L. No. 98-549, 98 Stat. 2779. The Cable Policy Act amends the Communications Act of 1934 to establish a comprehensive national cable television policy.

The Act envisions a franchising model similar to the City's procedure. It prohibits cable operators from providing cable service without a franchise. *Id.* § 621(b)(1). Section 621(a)(1) of the Act empowers a franchising authority "to award 1 or more franchises within its jurisdiction." The term "franchising authority" is defined broadly to include "any governmental entity empowered by Federal, State or local law to grant a franchise." *Id.* § 602(9). A franchise authorizes the construction of a cable system over public rights of way and over easements dedicated for compatible uses; the cable operator is responsible for paying the cost of installation and operation, ensuring the continued safety, functioning, and appearance of the property affected, and providing just compensation to the owners of property damaged in the course of installation and operation. *Id.* § 621(a)(2).

The Cable Policy Act also provides for mandatory access and leased access channels. Section 611 authorizes the franchising authority to require as a condition of the franchise the

to participate in the process to submit to a variety of conditions. A potential bidder must pay a $10,000 filing fee and a $500 good faith deposit and must agree to pay up to an additional $60,000 to reimburse the City for expenses incurred in holding the auction. It must provide the City with a detailed proposal outlining its intended operations over the succeeding nine years and must demonstrate to the satisfaction of the City that it has a "sound financial base," that its proposed operations constitute "sound business plans," and that it has the proper "character qualifications" and "demonstrated business experience." The City also requires hopeful bidders to agree to pay the City a percentage of future annual gross revenues and to provide a variety of customer services, including at least 52 channels of video service and interactive (two way) service.

More significantly, the City exacts a commitment to provide various mandatory access and leased access channels. Bidders must agree to provide, without compensation, two channels for use by the City and by other government entities, two channels for use by educational institutions, and two channels for use by the general public, along with staff and facilities to aid in programming. Bidders must further agree to provide two leased access channels as **[754 F.2d 1401]** well. An undertaking

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dedication of channel capacity for public, educational, or government use. Similarly, § 612 requires the operator to designate a percentage of its channel capacity for commercial use by persons unaffiliated with the operator. The Act prohibits the operator from exercising any editorial control over programming by public, educational, government, or unaffiliated commercial users. *See id.* §§ 611(e), 612(c)(2).

to provide portable production facilities and to permit free use by the City of all poles, towers, ducts, and antennas is also required.

Finally, potential cable operators must agree to leave a variety of business decisions to the discretion of the City. Pricing and customer relations are left to the City's control. The operator must form a "cable franchise advisory board," subject to City approval. Lastly, the City reserves the right to inspect the cable operation upon demand and requires a waiver of any right to recover for damages or other injury arising from the cable franchise or its enforcement.

After the submission of bids from companies willing to submit to the foregoing conditions, the City chooses the operator it deems to be "best" for each area. It awards just one franchise in each region. The City refused PCI's request for a franchise because PCI had failed to participate in the auction process. The City will not permit PCI to operate a cable television system in the South Central District under any circumstances.

III.

ISSUES ON APPEAL

PCI's appeal raises two issues – one constitutional and one statutory. The constitutional one is whether the City's cable franchise procedure in any respect violates the First Amendment. The statutory one is whether the City is immune from anti-trust liability under the doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

IV.

THE FIRST AMENDMENT

PCI's arguments amount to a sweeping attack against the City's cable television franchising process. PCI contends, inter alia, that its right to construct a cable television system and disseminate programming via the cable medium should not be conditioned upon having to participate in an auction procedure or be otherwise subject to the City's discretion. It maintains that the City cannot choose which cable providers may use the City's facilities to install and operate cable systems and cannot condition that use on such requirements as the City has imposed in this case.

These contentions are wide-ranging. Were we to attempt to respond in like measure, we would not escape the charge of rendering advisory opinions poorly disguised as sweeping dicta. On the other hand, we cannot regard this case as one which is either unripe for decision or moot. PCI has sought a franchise from the City which the City to date has refused to grant.

An escape from our dilemma would be to identify a fundamental issue which, if decided in favor of the City, would require affirming the judgment of the district court and which, if decided adversely to the City, would require reversal and a redesign by the City of its procedures relating to cable television. We believe such an issue is as follows:

> Can the City, consistent with the First Amendment, limit access by means of an auction process to a given region of the City to a single

> cable television company, when the public utility facilities and other public property in that region necessary to the installation and operation of a cable television system are physically capable of accommodating more than one system?

We do not decide the validity of any of the specific requirements called for by the City's franchising process. In particular, we do not decide whether the City may validly require cable operators to turn over channels for use by the government, by educational institutions, and by the public and for leased use by others.[4]

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[4] We note, however, that the mandatory access and leased access requirements contained in the City's franchising scheme and called for by §§ 611-612 of the Cable Communications Policy Act of 1984, Pub.L. No. 98-549, 98 Stat. 2779, 2782-85, pose particularly troubling constitutional questions. Imposing access requirements on the press would no doubt be invalid. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974). Courts have divided as to the effect of the *Tornillo* holding on the validity of access requirements imposed on cable television operators. *Compare Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1055-56 (8th Cir.1978) (suggesting that to the extent the government's interest in imposing such requirements stems from the economic scarcity of the cable medium, the Supreme Court's decision in *Tornillo* casts considerable doubt on the government's ability to do so), *aff'd on other grounds*, 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979) *with Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 n. 82 (D.C.Cir.) (suggesting that, unlike the right of reply statute involved in *Tornillo*, which was triggered by the publication of certain items, rules requiring cable operators to dedicate channels to common carrier use would not diminish the overall diversity of cable programming or deter the presentation of controversial material regarding public figures), *cert. denied*, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977) *and Berkshire Cablevision of Rhode Island v. Burke*, 571

The City denies that even this issue need be confronted. It asserts that PCI lacks **[754 F.2d 1402]** standing to challenge its franchising process. Although not denying the presence of a physical capacity to accommodate more than one cable television system, the City maintains that the physical scarcity of available space on public utility structures, the economic scarcity of the cable medium, and the disruptive effect that installing and maintaining a cable system has on the public domain each justify its effort to restrict access to its facilities to a single cable television company. Finally, the Cities of Palo Alto and Menlo Park and the Town of Atherton, as amici curiae, assert that the City's franchising scheme presents no impediment to PCI's ability to originate programing and thus does not contravene the First Amendment. Each of these arguments will be considered in turn.

We conclude that the question we consider raised by this appeal should be answered negatively. For that reason we reverse the district court's dismissal of PCI's First Amendment claim.

A. *Standing*

The City contends that, because it did not participate in the auction process, PCI lacks Article III standing to challenge the City's regulations. The Supreme Court set out the minimum requirements for standing in *Valley*

F.Supp. 976, 983-88 (D.R.I.1983) (upholding franchising procedure that required applicants to provide access channels for governmental, educational, and public use). We decline to reach this question.

Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). To invoke a court's authority, a party must:

> "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 [99 S.Ct. 1601, 1607, 60 L.Ed.2d 66] (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450 (1976).

Id. at 472, 102 S.Ct. at 758 (footnote omitted).[5]

PCI suffered no actual or threatened injury, the City maintains. Any injury is said to be purely speculative. We disagree. PCI's action challenges the auction process

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[5] In *Valley Forge*, the Supreme Court also articulated a set of prudential limitations on standing. *See also McMichael v. County of Napa*, 709 F.2d 1268, 1270 (9th Cir.1983). Thus, the plaintiff must assert his own legal rights and interests; his claim cannot rest on the rights or interests of a third party. 454 U.S. at 474, 102 S.Ct. at 759. Further, courts should refrain from adjudicating "abstract questions of wide public significance" amounting to " 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Id.* at 475, 102 S.Ct. at 760 (quoting *Warth v. Seldin*, 422 U.S. 490, 499-500, 95 S.Ct. 2197, 2205-2206, 45 L.Ed.2d 343 (1975)). Finally, the plaintiff's interest must fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* (quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970)). None of these principles operate to deny standing to PCI. *See Century Federal, Inc. v. City of Palo Alto*, 579 F.Supp. 1553, 1562 (N.D.Cal.1984).

itself. It has been barred from access because of its refusal to enter the bidding **[754 F.2d 1403]** process and abide by the City's numerous conditions. It follows that PCI clearly alleges a real injury, fairly traceable to the challenged action of the City. If PCI is right on its First Amendment claim as we have framed it, the City has wrongfully subjected PCI to a process that fails to conform to the requirements of the First Amendment. This affords PCI standing.

B. *The Cable Television Medium and the First Amendment*

Turning to the issue of the First Amendment protection enjoyed by cable television, it is clear that some such protection exists.[6] *See Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 127-29 (7th Cir.1982); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir.1981), *cert. dismissed*, 456 U.S. 1001, 102 S.Ct. 2287, 73 L.Ed.2d 1296 (1982); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1052-57 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 43-51 (D.C.Cir.), *cert. denied*, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977). The problem before us is whether this protection

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[6] For example, direct restrictions on the content of cable broadcasts would generally be invalid. *See, e.g., Cruz v. Ferre*, 571 F.Supp. 125 (S.D.Fla. 1983) (invalidates ordinance imposing sanctions on cable licensee's transmission of "indecent" programs); *Community Television of Utah, Inc. v. Roy City*, 555 F.Supp. 1164 (D.Utah 1982) (same); *Home Box Office, Inc. v. Wilkinson*, 531 F.Supp. 987 (D.Utah 1982) (same).

permits an affirmative answer to the issue this appeal raises or requires a negative answer.

1. *Cable Television and Broadcasting Distinguished*

Initially, the City argues that the standards applicable to government regulation of broadcasting also govern the regulation of cable. We disagree. We recognize that the First Amendment allows the government greater latitude in regulating the broadcast medium than it enjoys in regulating other, more traditional media. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943). And several courts, to a varying extent, have applied the broadcasting standards to the government's efforts to regulate cable. *See, e.g., Community Communications Co.*, 660 F.2d at 1375-80; *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69 (8th Cir.1968); *Berkshire Cablevision of Rhode Island v. Burke*, 571 F.Supp. 976, 983-88 (D.R.I.1983). We decline to do so. "Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it. . . . " *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557, 95 S.Ct. 1239, 1245, 43 L.Ed.2d 448 (1975). "[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co.*, 395 U.S. at 386, 89 S.Ct. at 1804. Despite the superficial similarity between broadcasting and cable television, there are significant differences between the two media that have First Amendment consequences.

The Supreme Court's determination to allow greater government intrusion into the affairs of broadcasters rests on the physical scarcity of radiowaves; the electromagnetic spectrum simply is physically incapable of carrying the messages of all who wish to use the medium. *Century Federal, Inc. v. City of Palo Alto*, 579 F.Supp. 1553, 1563 (N.D.Cal.1984). As Justice Frankfurter observed in *National Broadcasting Co. v. United States*,

> Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. . . . The right of free speech does not include, however, the right to use the facilities of radio without a license.

319, U.S. 190, 226-27, 63 S.Ct. 997, 1014, 87 L.Ed. 1344 (1943); *accord Loveday v. FCC*, 707 F.2d 1443, 1458 (D.C.Cir.), *cert. denied*, **[754 F.2d 1404]** ___ U.S. ___, 104 S.Ct. 525, 78 L.Ed.2d 709 (1983); *Scott v. Rosenberg*, 702 F.2d 1263, 1272 (9th Cir.1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1439, 79 L.Ed.2d 760 (1984). Without licensing, the broadcast spectrum would be rendered virtually useless to all.

That is not the case under the alleged facts before us. PCI wishes to obtain permission to string its cable from utility poles and through utility conduits. Because of PCI's refusal to comply with the City's auction process, the City has withheld that permission. We cannot accept the City's contention that, because the available space on such facilities is to an undetermined extent physically limited, the First Amendment standards applicable to the regulation of broadcasting permit it to restrict access and

allow only a single cable provider to install and operate a cable television system.

Apparently the only case to apply the physical scarcity rationale to cable television in such a direct fashion is *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69 (8th Cir.1968). That case involved the FCC's efforts to regulate an early community antenna system that merely retransmitted signals received from broadcasting stations; cable technology, however, has evolved significantly since the time of *Black Hills Video*. *See Midwest Video Corp.*, 571 F.2d at 1054; *Century Federal, Inc.*, 579 F.Supp. at 1563 n. 19. More recent cases have expressly concluded that the physical scarcity rationale does not apply to cable. *See, e.g., Omega Satellite Products Co.*, 694 F.2d at 127 ("[F]requency interference [is] a problem that does not arise with cable television."); *Home Box Office, Inc.*, 567 F.2d at 44-45 ("[A]n essential precondition of [broadcast] theory – physical interference and scarcity requiring an umpiring role for government – is absent."). *Black Hills Video*, therefore, is a doubtful precedent today.[7]

Moreover, PCI has alleged in its complaint that there *is* space available on the City's poles and in its conduits. PCI has alleged that the City has held itself out as a provider of space on its utility poles to cable television companies and that state law requires private utilities to

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[7] In *Midwest Video Corp. v. FCC*, the Eighth Circuit limited *Black Hills Video* to its facts, further undercutting its precedential value. *See* 571 F.2d at 1054 n. 71 (reading *Black Hills Video* as upholding FCC efforts to regulate cable operators' use of microwaves); *see also Century Federal, Inc.*, 579 F.Supp. at 1563 n. 19 (doubting continuing vitality of *Black Hills Video*).

make space available for the attachment of television cable. *See* Cal.Pub.Util.Code § 767.5(b) (West Supp.1984). Because we must accept these allegations as true, we must find that the physical scarcity that could justify increased regulation of cable operations does not exist in this case. We express no opinion on the issue of the manner in which the City should allocate access to poles and conduits to competing cable systems when these structures are incapable of accommodating all those seeking access.

2. *Natural Monopoly as a Justification of Government Regulation*

The City asserts next that, because cable television is a natural monopoly, economic scarcity justifies government regulation. We need not decide this issue at this time. PCI's complaint alleges that competition for cable services is economically feasible in the Los Angeles area. As we must accept this allegation as true, we assume that no natural monopoly exists.

In passing, we note that the Supreme Court rejected an argument that rested a particular government regulation of the press on economic scarcity. In *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), the Court invalidated a state statute granting political candidates a right to equal space to reply to criticism in newspapers. The Court refused to accept the plaintiff's argument that because economic conditions made entry into newspaper markets difficult, the government could impose a limited right of access to the press. Although the Court acknowledged that most

newspapers enjoy a monopoly in their areas of distribution, it did not conclude that this circum- **[754 F.2d 1405]** stance gave rise to a duty to provide public access to the press. *See id.* at 249-58, 94 S.Ct. at 2835-39; *see also Midwest Video Corp.*, 571 F.2d at 1056; *Home Box Office, Inc.*, 567 F.2d at 46.

Several cases, however, have concluded that cable's alleged natural monopoly characteristics do provide a basis for some degree of government regulation. *See, e.g., Community Communications Co.*, 660 F.2d at 1379; *Berkshire Cablevision of Rhode Island*, 571 F.Supp. at 985-86; *see also Omega Satellite Products Co.*, 694 F.2d at 127-28; *Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.*, 562 F.Supp. 543, 547 (W.D.Ky.1982). In *Community Communications Co.*, the Tenth Circuit distinguished *Tornillo* by tying the natural monopoly characteristics of cable to the fact that installing and operating a cable system burdens public utility facilities and streets. The court asserted that the economic scarcity present in *Tornillo* "was unrelated to a disruptive use of the public domain requiring a government license." 660 F.2d at 1379. A cable company, by contrast, "must significantly impact the public domain in order to operate; without a license, it cannot engage in cable broadcasting to disseminate information." *Id.*

This statement is much too broad. It suggests that simply because cable's disruption of the public domain gives rise to a need for licensing, it would also justify the monopoly the City seeks to create by its auction process. We find it necessary, however, to undertake a more detailed inquiry into whether the City's auction process is a permissible governmental response to the burden

imposed by cable on public resources.[8] We now turn to that question.

3. *Disruption of Public Resources as a Justification of Government Regulation*

Concluding that cable is not characterized by physical scarcity analogous to that of the broadcast medium or by economic scarcity does not mean that *all* regulation of cable operations is invalid. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 (D.C.Cir.), *cert. denied*, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977). The First Amendment does not preclude government regulation of noncommunicative aspects of speech. *Id.* at 47; *see Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502, 101 S.Ct. 2882,

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[8] The Tenth Circuit also suggested that newspapers had enjoyed a long tradition of freedom from government interference, while cable television had not. *Community Communications Co.*, 660 F.2d at 1379; *accord Berkshire Cablevision of Rhode Island*, 571 F.Supp. at 985. This distinction merely begs the question.

The district court in *Berkshire Cablevision* offered a more helpful distinction. It asserted that, while a newspaper's natural monopoly did not preclude the public's use of the print medium, cable's natural monopoly did prevent public use of the television medium. *See* 571 F.Supp. at 986. As a factual matter, however, it is not clear that this is true. *Cf. Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C.Cir.) (noting the proliferation of broadcast stations since the *National Broadcasting* case and the fact that now there are many more stations than newspapers, and concluding that "it seems unlikely that the First Amendment protections of broadcast political speech will contract further, and they may well expand."), *cert. denied*, ___ U.S. ___, 104 S.Ct. 525, 78 L.Ed.2d 709 (1983). And in reviewing a dismissal, we must resolve all doubts in favor of the plaintiff.

2889, 69 L.Ed.2d 800 (1981) (Opinion of White, J.) ("[T]he government has legitimate interests in controlling the noncommunicative aspects of the medium, . . . but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects.") (citation omitted).

The Supreme Court articulated a test for assessing the reasonableness of such regulations in *United States v. O'Brien:*

> [A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment free- **[754 F.2d 1406]** doms is no greater than is essential to the furtherance of that interest.

391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968); *see Playtime Theaters, Inc. v. City of Renton,* 748 F.2d 527, 534-35 (9th Cir.1984). PCI concedes that the City has an interest in minimizing the disruption of the public domain and that this interest is "unrelated to the suppression of free expression."[9] But the means chosen by the

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[9] In their amicus brief, the Cities of Palo Alto, Menlo Park, and Atherton suggest several other government "interests" served by a restrictive franchising regime. Amici assert that the City has interests in preventing "cream skimming" – wiring only affluent, and therefore more profitable, portions of the franchise area; ensuring the provision of community access and leased access to cable facilities, and encouraging the development of state-of-the-art cable systems. Amici contend that these

City to serve its interests – allowing only the single company selected through the franchise auction process to erect and operate a cable system in each region – creates a serious risk that city officials will discriminate among cable providers on the basis of the content of, or the views expressed in, their proposed programs. This risk can be reduced, if not eliminated, by means less destructive of First Amendment rights.

Cable television, to repeat, requires the use of public facilities, and this provides a justification for some government regulation. The City has legitimate interest in

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interests serve to justify the City's approach to cable franchising.

On the present state of the record, we cannot agree. Here, the City bears the burden of proving that the elements of the *O'Brien* test are satisfied. *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527, 535 (9th Cir.1984); *see First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978); *Elrod v. Burns*, 427 U.S. 347, 362, 96 S.Ct. 2673, 2684, 49 L.Ed.2d 547 (1976) (Opinion of Brennan, J.). Nothing in the record suggests that the City has a substantial interest in any of the concerns raised by amici. As we indicated in *Playtime Theaters*, the City must justify its regulations in terms of its own problems. It may not rely on the problems faced by other communities or on justifications that are merely conclusory and speculative. *See* 748 F.2d at 536-37. Furthermore, there must be a showing that these interests are "unrelated to the suppression of free expression." *See O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679. There is nothing in the record on this issue. We are not convinced that restricting the number of cable operators in the manner set forth in PCI's complaint furthers these interests in a manner consistent with the First Amendment. As we noted earlier, we express no opinion as to whether the City may impose its access and coverage requirements by other means. Those issues are not before us.

public safety and in maintaining public thoroughfares. In *Community Communications Co.*, 660 F.2d at 1377, the court recognized that cable entails use of the public domain and that this use constitutes a basis for governmental regulation that is not present in case of newspapers:

> A city needs control over the number of times its citizens must bear the inconvenience of having its streets dug up and the best times for it to occur. Thus, government and cable operators are tied in a way that government and newspapers are not.

Id. at 1378; *accord Omega Satellite Products Co.*, 694 F.2d at 127-28; *Berkshire Cablevision of Rhode Island*, 571 F.Supp. at 984.

Regulating such use and inconvenience, however, is quite different from restricting access, as the City attempts to do here. It has not been alleged that public utility facilities owned or controlled by the City can only support the use of a single or a few cables. Indeed, PCI has alleged precisely the contrary. A different and more sharply focused response by the City could protect the legitimate interests of the City and its citizens.

Certainly, the mere fact that the burden on public resources creates a need for government regulation does not lead to the conclusion that the First Amendment allows as much government intrusion in the cable area as it does with regard to broadcasting. *See* Comment, *Access to Cable Television: A Critique of the Affirmative Duty Theory of the First Amendment*, 70 Calif.L.Rev. 1393, 1405-08 (1982). Nor do we believe that the City's interest in protecting the public domain justifies its effort to auction off the right to operate a cable television system. The City's

interest is not enough to counterbalance the risk that diversity in editorial judgments will be limited by the City's determination to **[754 F.2d 1406]** choose the cable providers that it will permit to use the medium. *Cf. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258, 94 S.Ct. 2831, 2839, 41 L.Ed.2d 730 (1974) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.")

4. *The Public Forum Doctrine as a Check on Government Regulation*

Our conclusion that the question before us should be answered, "No," is aided by Supreme Court cases shaping the public forum doctrine. What PCI wants, in essence, is a right of access to utility poles and conduits that are either owned or controlled by the City, subject, of course, to reasonable terms designed to compensate the City for the use of those facilities. PCI wishes to disseminate its message to the public. Of course, "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Council of Greenburgh Civic Association*, 453 U.S. 114, 129, 101 S.Ct. 2676, 2685, 69 L.Ed.2d 517 (1981). Rather, the nature and character of the property at issue fix the conditions under which we must

evaluate both PCI's claimed right of access and the limitations imposed by the City on that right. *See Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 44, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983). "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972); *see United States v. Albertini*, 710 F.2d 1410, 1414 (9th Cir. 1983) ("Merely permitting public access to property other than streets or parks . . . does not open the facility for use as a public forum. . . . The place or its intended use must somehow render the facility appropriate for expression.") (citation omitted).

The Supreme Court has identified three categories of public property. At one extreme are "places which by long tradition or by government fiat have been devoted to assembly and debate. . . . " *Perry Education Association*, 460 U.S. at 45, 103 S.Ct. at 954. This category includes "streets and parks . . . [that] have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939) (Opinion of Roberts, J.). In such places, the First Amendment sharply curtails the government's ability to limit expressive activity. *Perry Education Association*, 460 U.S. at 45, 103 S.Ct. at 954. While the government may not ban communication entirely, it may enforce content-neutral regulations of the time, place, and manner of expression that "are narrowly tailored to serve a significant government interest, and leave open ample

alternative channels of communication." *Id.*; *see Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762 85 L.Ed. 1049 (1941). To pass constitutional scrutiny, a content-based exclusion of expression must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Perry Education Association*, 460 U.S. at 45, 103 S.Ct. at 955; *Carey v. Brown*, 447 U.S. 455, 461-62, 100 S.Ct. 2286, 2290-91, 65 L.Ed.2d 263 (1980).

A second category comprises public property that the government has opened for use by the public for expressive activity. *Perry Education Association*, 460 U.S. at 45, 103 S.Ct. at 954; *see, e.g., Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (university meeting facilities opened for use by student **[754 F.2d 1407]** groups). Although the state is not required to retain the open character of its facilities indefinitely, while it does so, the standards applicable to the traditional public forum govern the state's regulatory efforts. *Perry Education Association*, 460 U.S. at 46, 103 S.Ct. at 955. Again, the government is empowered to enforce reasonable time, place, and manner regulations. *Id.*

The third and final category is property "which is not by tradition or designation a forum for public communication. . . . " *Id.*; *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 131 n. 7, 101 S.Ct. 2676, 2686 n. 7, 69 L.Ed.2d 517 (1981). There, "[i]n addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's

view." *Perry Education Association*, 460 U.S. at 46, 103 S.Ct. at 955.

a. *Utility Poles and Conduits are not Traditional Public Forums*

We reject the contention that merely because utility poles and conduits are located on or under public streets and rights-of-way, they constitute traditional public forums. *See generally* G. Shapiro, P. Kurland, & J. Mercurio, *'Cablespeech' The Case for First Amendment Protection* 175-84 (1983). The Supreme Court's recent decision in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, ___ U.S. ___, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), precludes such a conclusion. There, the Court upheld a municipal ordinance prohibiting the posting of signs on public property – including public utility poles. Citing *O'Brien*, the Court concluded that the government had a valid interest in advancing aesthetic values and that the ordinance was no broader than necessary to protect that interest. *See* 104 S.Ct. at 2129-32.

The Supreme Court also rejected the plaintiff's contention that the public property covered by the ordinance constituted a public forum or should have been treated as a public forum because of its location on streets and thoroughfares which traditionally were so viewed. *See id.* at 2133-34. The plaintiff had not demonstrated "the existence of a traditional right of access respecting such items as utility poles for purposes of their communication comparable to that recognized for streets and parks. . . . " *Id.* at 2134.

b. *Vincent Distinguished*

We do not believe, however, that *Vincent* governs the issue before us. First, PCI's envisioned use of the City's facilities –stringing or laying cable – is basically compatible with the normal use of those facilities – carrying phone and electricity lines. This was not true in *Vincent*, where the plaintiffs sought to post signs on lamp-posts and utility poles. It is possible, therefore, that although the public utility poles and conduits are not public forums by tradition or designation, each may nevertheless serve as a forum for expression via the cable medium. *See Gannett Satellite Information Network v. Metropolitan Transportation Authority*, 745 F.2d 767, 773 (2d Cir.1984) ("Public property, . . . which is neither a traditional nor a designated public forum, can still serve as a forum for First Amendment expression if the expression is appropriate for the property . . . and is not 'incompatible with the normal activity of a particular place at a particular time.' ") (citation omitted) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972)). Thus, while a flat ban on sign posting may constitute a narrowly tailored measure to promote the City's interest in eliminating visual clutter, *see Taxpayers for Vincent*, 104 S.Ct. at 2130-32, banning the installation of cable is not necessarily an appropriate way to further the City's interest in minimizing disruption of the public domain, *see Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972) ("The nature of **[754 F.2d 1408]** a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' ") (quoting

Wright, *The Constitution on the Campus*, 22 Vand.L.Rev. 1027, 1042 (1969)).

Second, PCI's complaint sufficiently alleges that the utility facilities at issue *do* constitute a kind of pubic forum, either by tradition or by designation. The State of California has dedicated "surplus space" on public utility structures for use by cable television companies. *See* Cal.Pub.Util. Code § 767.5(b) (West Supp.1984). And as to City-owned structures, PCI alleges that the Los Angeles Department of Water and Power has held itself out to cable companies as a provider of pole-attachment services. Moreover, the franchising process itself constitutes the City's effort to grant at least some access to its facilities.

Treating the utility structures as a type of public forum places limits on the City's ability to exercise its licensing power. While the City may promulgate reasonable time, place, and manner regulations, it may not limit access under the circumstances set forth in the issue before us. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51, 89 S.Ct. 935, 938-39, 22 L.Ed.2d 162 (1969) ("[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional."); *accord NAACP, Western Region v. City of Richmond*, 743 F.2d 1346, 1357 (9th Cir.1984) ("Unfettered discretion to license speech cannot be left to administrative bodies."). The City may not solicit "bids" from prospective speakers and deny access to its facilities to all save the highest "bidder" in each region.

Moreover, even if *Vincent* requires the conclusion that the utility poles and conduits do not constitute a public forum for the purpose of cable transmission, the City may not suppress expression on those structures merely because it disagrees with the speaker's viewpoint. *See Perry Education Association*, 460 U.S. at 46, 103 S.Ct. at 955. While an outright ban would be viewpoint neutral, *see Taxpayers for Vincent*, 104 S.Ct. at 2128-29, the City's action in the instant case creates an impermissible risk of covert discrimination based on the content of or the views expressed in the operator's proposed programming. *See Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 649, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981). *Vincent* does not support the City's attempt to single out one cable television company to be the one speaker it will permit to use public property for expressive purposes, while it forbids access for those purposes to all others.

Allowing a procedure such as the City's would be akin to allowing the government discretion to grant a permit for the operation of newspaper vending machines located on public streets only to the newspaper that the government believes "best" serves the community, a practice which we find clearly invalid. *See e.g., Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666, 673-75 (11th Cir.1984) (striking down a license tax applicable to newspaper vending machines that gave the city council discretion to deny issuance of a license where the applicant failed to comply with pertinent ordnances and regulations). Instead, the City must content itself with uniformly applying to all applicants regulations tailored to minimize the burden on public resources and granting

franchises to all cable operators who are willing to satisfy the City's legitimate conditions. We repeat, we do not in this opinion address a situation in which the City lacks the facilities to accommodate all who otherwise meet its conditions.

5. *Mandatory and Leased Access Channels and the City's Power to Restrict Access to the Cable Medium.*

Amici suggest that the City's licensing procedure imposes no restriction on PCI's First Amendment rights. The mandatory access and leased access re- **[754 F.2d 1409]** quirements, amici assert, provide PCI with the opportunity to originate programming and to disseminate its message using the cable medium. The City merely would require that PCI use another's wires to transmit its programming. We disagree.

We reject the contention that the City's access requirements provide complete protection for the exercise of expressive rights. Arranging programming for an entire cable television system entails engaging in a wide variety of protected activities.[10] Substituting the chance

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[10] In addition to originating their own programming, cable television operators exercise considerable editorial discretion regarding what their programming will include. *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 & n. 17, 99 S.Ct. 1435, 1445 & n. 17, 59 L.Ed.2d 692 (1979). Editorial judgment is entitled to First Amendment protection. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257-58, 94 S.Ct. 2831, 2839-40, 41 L.Ed.2d 730 (1974). Undeniably, cable operators do transmit programs produced by others. To the extent an operator does so,

to share a few mandatory access and leased access channels with others for the rights to operate an entire cable system necessarily diminishes PCI's opportunity to engage in such protected activities. A law allowing free expression in public parks only for a few minutes at 6 a.m. hardly provides an adequate replacement for the right to free, untrammeled debate in that forum. By the same reasoning, we cannot hold, solely on the basis of PCI's complaint, that the City's franchising program provides PCI with an adequate substitute for its right to

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however, we believe it would be treated for First Amendment purposes as would be theater owners, booksellers, and concert promoters. Their First Amendment protection is not diminished because they distribute or present works created by others. *See, e.g., Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968) (movie theaters); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963) (booksellers); *Cinevision Corp. v. City if Burbank*, 745 F.2d 560 at 567-68 (concert promoters). And PCI does not lose its First Amendment rights merely because its judgment is tempered by commercial considerations. *See Gannett Satellite Information Network v. Metropolitan Transp. Auth.*, 745 F.2d 767, 772 (2d Cir.1984) (sale of newspapers is protected by the First Amendment); *Cinevision Corp.*, 745 F.2d at 567 (promoting concerts for profit enjoys First Amendment protection); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504 n. 11, 101 S.Ct. 2882, 2890 n. 11, 69 L.Ed.2d 800 (1981) (noting lower court's confusion of "the category of 'commercial speech' with the category of individuals who have a 'commercial interest' in protected speech."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 n. 23, 98 S.Ct. 1407, 1421 n. 23, 55 L.Ed.2d 707 (1978) ("It is too late to suggest 'that the dependence of a communication on the expenditure of money itself operates to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.") (quoting *Buckley v. Valco*, 424 U.S. 1, 16, 96 S.Ct. 612, 633, 46 L.Ed.2d 659 (1976)).

operate a cable system. Nothing in this opinion is inconsistent with a city-operated franchise system that respects First Amendment rights, Congress must be presumed to have envisioned such a system.

Our conclusion can be reached in another way. The cases recognize that an otherwise valid restriction on protected expression may be rendered invalid, if the modes of communication that remain are inadequate. *See, e.g., Taxpayers for Vincent*, 104 S.Ct. at 2132-33; *Heffron*, 452 U.S. at 654-55, 101 S.Ct. at 2567-68. But the reverse is not true. That is, an otherwise invalid restriction on protected activity is not saved by the availability of other means of expression. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77, 101 S.Ct. 2176, 2186-2187, 68 L.Ed.2d 671 (1981) (" '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' ") (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939)); *accord Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 1346, 1355 & n. 8 (9th Cir.1984). The City's argument is hard to distinguish from an assertion that a law prohibiting Mr. X or Mrs. Y from publishing a newspaper is valid, so long as each is provided an adequate space to print his or her message in already existing newspapers. Obviously, such a law would be invalid. We conclude, therefore, that allow- **[754 F.2d 1410]** ing PCI access to another's channels is not the equivalent of providing it access to an audience by means of its own cable.

C. *Conclusion*

We repeat the issue we undertook to resolve:

> Can the City, consistent with the First Amendment, limit access by means of an auction process to a given region on the City to a single cable television company, when the public utility facilities and other public property in that region necessary to the installation and operation of a cable television system are physically capable of accommodating more than one system?

Our answer is no, the City cannot.[11]

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[11] As already mentioned, *see supra* p. 1400 n. 3, § 621(a)(1) of the Cable Communications Policy Act of 1984. Publ.L. No. 98-549, 98 Stat. 2779, 2786, empowers a local authority to "award . . . 1 or more franchise within its jurisdiction." To the extent that this provision authorizes the government to protect its interest in regulating disruption of public resources through a system of permits or franchises, *see id.* § 621(a)(2) (noting government's interest in promoting safety and in ensuring that the costs of installation and operation are borne by the cable operator); *see also id.* § 602(8) (defining "franchise" as an initial authorization (or a renewal thereof), whether designated as a franchise, license, permit, or otherwise), it passes muster under the principles announced here. But we cannot agree with the suggestion in the legislative history that the provision "grants to the franchising authority the discretion to determine the number of cable operators to be authorized to provide service in a particular geographic area." 11 R.Rep. No. 934, 98th Cong., 2nd Sess. 39, *reprinted in* 1984 U.S. Code Cong. & Ad.News 1984, p. 4655, 4696. A construction of such breadth would be invalid.

V.

ANTITRUST IMMUNITY

States, acting "as sovereigns," are immune from liability under the Sherman Act. *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 397, 87 L.Ed. 315 (1943). This immunity stems from principles of federalism: the Supreme Court was unwilling to attribute to Congress an unexpressed intent to restrict state authority to replace competition with regulation or public ownership. *See id.* at 350-52, 63 S.Ct. at 313-14.

Municipalities and other political subdivisions of the state, however, do not automatically share in the state's immunity. In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978), the Court held that a municipality could be sued under the antitrust laws for refusing to sell gas and water to residents living outside the city limits who would not also agree to purchase electricity from the city. A plurality of the Court advanced the view that a municipality's anticompetitive conduct is not shielded from antitrust scrutiny, unless the municipality acts "pursuant to [a] state policy to displace competition with regulation or monopoly public service." *Id.* at 413, 98 S.Ct. at 1136 (plurality opinion). The plurality emphasized that the state policy pursued by the municipality must be "clearly articulated and affirmatively expressed." *See id.* at 410, 98 S.Ct. at 1135 (plurality opinion). A majority of the Court confirmed the *Lafayette* plurality's opinion in *Community*

Communications Co. v. City of Boulder, 455 U.S. 40, 51, 102 S.Ct. 835, 840, 70 L.Ed.2d 810 (1982).[12]

[754 F.2d 1412] Two questions confront us. The first is whether the City acted under a "clearly articulated and affirmatively expressed" state policy displacing competition with regulation or monopoly in the area of cable television. The second question is whether our holding with respect to the First Amendment deprives the City, as PCI contends, of any state action immunity under the antitrust laws.

At the time of this appeal, we faced a third question: whether the state must actively supervise policies authorizing anticompetitive conduct by its municipalities. *See*

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[12] The *Boulder* case concerned itself only with the availability of injunctive relief. *Century Federal, Inc. v. City of Palo Alto*, 579 F.Supp. 1553, 1555 n. 6 (N.D.Cal.1984). Whether a majority of the Court would similarly curtail a municipality's state action immunity in a suit seeking treble damages remains unsettled. *See Lafayette*, 435 U.S. at 442-43, 98 S.Ct. at 1151-52 (Blackmun, J., dissenting); *see also Cantor v. Detroit Edison Co.*, 428 U.S. 579, 614 n. 6, 96 S.Ct. 3110, 3129 n. 6, 49 L.Ed2d 1141 (1976) (Blackmun, J., concurring in judgment) (discussing availability of a defense based on the unfairness of holding a private party liable where the state's participation dominates a decision to adopt a restraint challenged under the antitrust laws and asserting that "unfairness" would be a defense only to the recovery of damages, not to suit seeking injunctive relief). *See generally* P. Areeda, *Antitrust Law* ¶ 212.2b, at 48-49 (Supp.1982) (arguing that damages should not be available in antitrust suits brought against municipalities and suggesting that antitrust scrutiny of municipal actions may be more readily justified if damages are unavailable). Because we conclude that the statutory authorization for the City's franchising scheme satisfies the *Boulder* test, we do not reach this issue.

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105-06, 100 S.Ct. 937, 943-44, 63 L.Ed.2d 233 (1980) (imposing requirement of active state supervision over policies authorizing *private* anticompetitive conduct); *Community Communications Co.*, 455 U.S. at 51 n. 14, 102 S.Ct. at 841 n. 14) (leaving open the question whether the active supervision requirement applies to *municipal* defendants as well). The Supreme Court has since answered this question negatively, *see Town of Hallie v. City of Eau Clair*, ___ U.S. ___, 105 S.Ct. 1713, 1720-21, ___ L.Ed.2d ___ (1985), and therefore, we need not address it further.

A. *"Clearly Articulated and Affirmatively Expressed" State Policy*

Following *Lafayette* and *Boulder*, this circuit has developed a two part test for assessing the availability of municipal *Parker v. Brown* immunity.

> To prove that a policy is clearly articulated and affirmatively expressed, the City must demonstrate not only the existence of a state policy to displace competition with regulation, but also that the legislature contemplated the kind of actions alleged to be anticompetitive.

Golden State Transit Corp. v. City of Los Angeles, 726 F.2d 1430, 1433 (9th Cir.1984); *e.g., Tom Hudson & Associates v. City of Chula Vista*, 746 F.2d 1370, 1373 (9th Cir.1984).

The City's franchising process is authorized by Cal.Gov't Code § 53066 (West Supp.1984).[13] That provision is entirely permissive; it does not require or compel franchising or exclusive franchising, but merely provides that cities "may" license or franchise the construction of community antenna television systems using public property and easements. *See Century Federal, Inc. v. City of Palo Alto*, 579 F.Supp. 1553, 1556-57 (N.D.Cal.1984) (discussing section 53066).

PCI argues that a "clearly articulated and affirmatively expressed" state policy means a clear and express state policy to supercede the antitrust laws and that section 53066 does not reflect such a policy. PCI points out

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[13] In relevant part, section 53066 provides:

> Any city or county or city and county in the state of California may . . . authorize by franchise or license the construction of a community antenna television system. . . . The award of the franchise or license may be made on the basis of quality of service, rates to the subscriber, income to the city, county, or city and county, experience and financial responsibility of the applicant plus any other consideration that will safeguard the public interest, rather than a cash auction bid. . . . Any cable television franchise or license awarded . . . pursuant to this section may authorize the grantee thereof to place wires, conduits and appurtenances for the community antenna television system along or across such public streets, highways, alleys, public properties, or public easements of said city or county or city and county.

Cal.Gov't Code § 53066 (West Supp.1984); *see also* Cal. Const. art. XI, § 9 (West Supp.1985) (authorizing municipal operation or regulation of public works to furnish inhabitants with, inter alia, means of communication); Cal.Gov't Code § 53066.1 (West Supp.1984) (deregulating cable television rates).

that the provision merely permits cities to franchise cable systems and to consider accepting consideration oth- **[754 F.2d 1413]** er than cash in awarding the franchise. Consequently, PCI contends, the City's determination to eliminate competition among cable operators by limiting the number of franchises it issues reflects *city* policy not *state* policy. We disagree.

In making this argument, PCI relies on the Supreme Court's decision in *Boulder*. There, the municipality passed an ordinance placing a moratorium on the plaintiff cable company's efforts to expand its service. The city planned to invite new companies to submit proposals for cable service. The plaintiff sued, inter alia, under the antitrust laws. 455 U.S. at 45-47, 102 S.Ct. at 837-839. The city was a "home rule" municipality, granted extensive powers of self-government by the state constitution. *Id.* at 43 & n. 1, 102 S.Ct. at 836 & n. 1. The question faced by the Court was whether the home rule provision in the state constitution alone afforded state action immunity to the city. The Court decided that it did not. The requirement of "a clearly articulated and affirmatively expressed state policy" is not satisfied "when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought." *Id.* at 55, 102 S.Ct. at 842.

PCI asserts that, like the home rule provision at issue in *Boulder*, the permissive stance taken by California with regard to cable franchising reflects mere neutrality with respect to whether cable should be competitive. The City

"can choose to prescribe monopoly service, while . . . another can elect free-market competition. . . . " *Id.* at 56, 102 S.Ct. at 843. Both alternatives are comprehended by the power granted by the state. *Id.; see Grason Electric Co. v. Sacramento Municipal Utility District*, 526 F.Supp. 276, 278-79 (E.D.Cal.1981).

PCI's argument is not without force. We agree that the state has vested its municipalities with discretion in exercising their delegated power to franchise cable television. We do not believe, however, that this fact strips the City of state action immunity.

To begin with, the present case differs from *Boulder.* The home rule provision at issue there had nothing to say about cable television regulation. *See* 455 U.S. at 55, 102 S.Ct. at 812 ("Nor can [the anticompetitive] actions be truly described as 'comprehended within the powers *granted*,' since the term, 'granted,' necessarily implies an affirmative addressing of the subject by the State. The State did not do so here. . . . "). Here, the California legislature has *affirmatively addressed* the subject of cable television with a statute that is far more specific than that involved in *Boulder. See, e.g., Tom Hudson & Associates*, 746 F.2d at 1373-74; *Century Federal, Inc.*, 579 F.Supp. at 1557. Section 53066 marks a clear legislative determination to delegate control over cable television to local authorities. Furthermore, the legislature reaffirmed this determination when it passed section 53066.1, a measure that removed local authority to regulate rates charged by certain cable operators. With reference to local regulation of other aspects of cable television, the legislature found that

> [w]hile the development and the regulation of cable television is a matter of statewide concern, the Legislature finds and directs that the exercise of the police power of the State of California concerning cable television *should*, except as otherwise directed by the Legislature, *remain in the cities, counties, or cities and counties. . . .*

Cal.Gov't Code § 53066.1(p) (West Supp. 1984) (statement of legislative finding and direction) (emphasis added).

Narrowly drawn, explicit delegation is not required. The Supreme Court has never held "that the challenged municipal conduct need be inescapably mandated by the **[754 F.2d 1414]** State." *Tom Hudson & Associates*, 746 F.2d at 1372; *see Town of Hallie*, at ___, 105 S.Ct. at 1718-19. The cases do not require "that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit." *Lafayette*, 435 U.S. at 415, 98 S.Ct. at 1138 (plurality opinion); *accord Springs Ambulance Service v. City of Rancho Mirage*, 745 F.2d 1270, 1273 (9th Cir.1984).

Were it otherwise, the specter of antitrust liability would unduly hamper the state's ability to allocate governmental authority between itself and its subdivisions. Restricted too would be its use of municipalities to regulate areas requiring flexibility and the exercise of wide discretion at the local level. *See Lafayette*, 435 U.S. at 416, 98 S.Ct. at 1138 (plurality opinion); *Century Federal, Inc.*, 579 F.Supp. at 1558. *See generally* Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 Harv.L.Rev. 435, 445 n. 49 (1981). We are unwilling to impose these constraints.

Thus, we conclude that *Parker* immunity exists when we find " 'from the authority given a governmental entity to operate in a particular area[] that the legislature contemplated the kind of action complained of.' " *Lafayette*, 435 U.S. at 415, 98 S.Ct. at 1138 (plurality opinion) (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431, 434 (5th Cir.1976), *aff'd*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978)); *e.g.*, *Tom Hudson & Associates*, 746 F.2d at 1372-73. Put somewhat differently, in the past we have looked to "whether the action is a 'necessary or reasonable consequence of engaging in the authorized activity.' " *Catalina Cablevision Associates v. City of Tucson*, 745 F.2d 1266, 1269 (9th Cir.1984) (quoting *Gold Cross Ambulance & Transfer & Standby Service v. City of Kansas City*, 705 F.2d 1005, 1013 (8th Cir.1983)); *accord Springs Ambulance Service*, 745 F.2d at 1273; *see Town of Hallie*, 105 S.Ct. at 1718.

We employed this approach in *Catalina Cablevision Associates*, 745 F.2d at 1266. There, the defendant city intended to issue one, nonexclusive cable license, reserving the right to issue other nonexclusive licenses later. Accordingly, the City granted the license to one company and denied a license to the plaintiff. The state statute authorizing cable licensing, Ariz.Rev.Stat.Ann. § 9-506 (West.1977), was, if anything, less specific than section 53066. *See Century Federal, Inc.*, 579 F.Supp. at 1557 n. 9. It merely provided that cities "may issue a license to any person" for the purpose of regulating the construction and operation of cable television systems and required that cities impose restrictions on the use of public streets

and on the construction and maintenance of cable systems. *See Catalina Cablevision Associates*, 745 F.2d at 1268-69.

We observed that cable television systems, much like telephone and public utility systems, burden public resources and that the statute accordingly directed the licensing authority to "impose conditions, restrictions, and limitations" on the use of public streets and on the construction of cable television systems. However, we concluded that "the legislature necessarily contemplated that cities would limit the number of cable providers despite the anticompetitive effects that such action might have." *Id.* at 1269-70. Therefore, the statute afforded state action immunity to the city's decision to issue a single, nonexclusive license.

We see no reason to reach a different result in this case. Section 53066 expressly notes that cities "may authorize the [franchisee or licensee] to place wires, conduits, and appurtenances . . . along or across streets, highways, alleys, public properties, or public easements," indicating the legislature's awareness that it was delegating regulatory authority to deal with the bur- **[754 F.2d 1415]** den placed on public resources by cable television. That some cities, to minimize the disruption of public resources, might limit the number of cable providers seems to us to constitute at least a reasonable consequence of their engaging in the authorized regulatory activity. This possibility surely was in the contemplation of the legislature when it enacted section 53066. Accordingly, we conclude that the City acted pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation.

B. *The Effect on the City's Claim of State Action Immunity of Holding That the First Amendment Bars the City's Effort to Limit the Number of Cable Operators*

We have already held that PCI adequately alleged a specific violation of the First Amendment. PCI contends that a finding of unconstitutionality in any respect entitles it to prevail on its antitrust claim as well. To the extent section 53066 authorizes the City to use its franchising process in an unconstitutional manner, PCI asserts, the statute cannot afford state action immunity to the City's anticompetitive franchising process. We reject this contention.

PCI's argument confuses two separate sets of purposes: the purposes served by the antitrust laws and the purposes served by the First Amendment. State action is immune from the antitrust laws merely because the state itself has decided to act. *Hoover v. Ronwin*, ___ U.S. ___, 104 S.Ct. 1989, 1998, 80 L.Ed.2d 590 (1984). Congress did not intend the Sherman Act to extend to the sovereign acts of state governments. *Parker v. Brown*, 317 U.S. 341, 351, 63 S.Ct. 307, 313, 87 L.Ed. 315 (1943). The First Amendment, on the other hand, is directed at government, both federal and state. There is no more reason to subject the state to antitrust liability because of First Amendment violations than there would be, for example, to deprive it of a federal subsidy such as mass transit aid.

It makes no difference that here it is the City that is charged with the First Amendment violation. For antitrust purposes, it is the state that has acted. "Clear articulation" and "active supervision" are merely analytical tools used to determine whether acts carried out by

municipalities and private entities are in fact the actions of the state. *See Hoover,* 104 S.Ct. at 1995-96. PCI has alleged a First Amendment claim. It has not alleged an antitrust claim. Each conclusion is compatible with the other.[14]

We reverse the district court's dismissal of PCI's First Amendment claim and affirm its dismissal of the antitrust claims and remand the case for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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[14] We note the Supreme Court's opinion in *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), a case that involved a challenge to a state bar disciplinary rule banning lawyer advertising that had been incorporated as one of the rules of the Arizona Supreme Court. *See id.* at 355, 97 S.Ct. at 2694. The Court found that, to the extent it prohibited attorneys from advertising the availability and the terms of their legal services, the rule violated the First Amendment. *See id.* at 363-84, 97 S.Ct. at 2698-99. This conclusion, however, did not prevent the Court from finding that, as the ban was an affirmative command of the state supreme court, the state action exemption barred the plaintiffs' antitrust claim. *See id.* at 359-63, 97 S.Ct. at 2696-99. Although the Court did not discuss the interplay between the plaintiffs' constitutional claim and their antitrust claim, we see no reason not to reach the same result here.

476 U.S. 488

CITY OF LOS ANGELES and DEPARTMENT OF WATER AND POWER,
Petitioners

v.

PREFERRED COMMUNICATIONS, INC.

476 U.S. 488, 90 L. Ed. 2d 480, 106 S. Ct. 2034

Certiorari To The United States Court Of Appeals For The Ninth Circuit

No. 85-390

Argued April 29, 1986. Decided June 2, 1986.

[476 US 490]

OPINION OF THE COURT

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Preferred Communications, Inc., sued petitioners City of Los Angeles (City) and the Department of Water and Power (DWP) in the United States District Court for the Central District of California. The complaint alleged a violation of respondent's rights under the First and Fourteenth Amendments, and under §§1 and 2 of the Sherman Act, by reason of the City's refusal to grant respondent a cable television franchise and of DWP's refusal to grant acess to DWP's poles or underground conduits used for power lines. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted. See Fed. Rule Civ. Proc. 12(b)(6). The Court of Appeals for the Ninth Circuit affirmed with respect to the Sherman Act, but reversed as to the First Amendment claim. 754 F.2d 1396 (1985). We granted certiorari with respect to the latter issue, 474 U.S. 979 (1985).

Respondent's complaint against the City and DWP alleged, *inter alia*, the following facts: Respondent asked Pacific Telephone and Telegraph (PT&T) and DWP for permission to lease space on their utility poles in order to provide cable television service in the south central area of Los Angeles. App. 6a. These utilities responded that they would not lease the space unless respondent first obtained a cable television franchise from the City. *Ibid.* Respondent asked the City for a franchise, but the City refused to grant it one, stating that respondent had failed to participate in an auction that was to award a single franchise in the area. *Id.*, at 6a-7a.[1]

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[1] California authorizes municipalities to limit the number of cable television operators in an area by means of a "franchise or license" system, and to prescribe "rules and regulations" to protect customers of such operators. See Cal Gov't Code Ann. § 53066 (West Supp. 1986). Congress has recently endorsed such franchise systems. See Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2779. Pursuant to the authority granted by the State, the City has adopted a provision forbidding the construction or operation of a cable television system within city limits unless a franchise is first obtained. See Los Angeles, Cal. Admin. Code, Art. 13, § 13.62(a) (1979). A city ordinance provides that franchises are to be allotted by auction to the bidder offering "the highest percentage of gross annual receipts" derived from the franchise and "such other compensation or consideration . . . as may be prescribed by the Council in the advertisement for bids and notice of sale." See Los Angeles Ordinance 58,200, § 5.2. (1927)

In October 1982, the City published an advertisement soliciting bids for a cable television franchise in the south central area of Los Angeles. The advertisement indicated that only one franchise would be awarded, and it established a deadline for the submission of bids. App. 91a. It also set forth certain nonfinancial criteria to be considered in the selection process, including the degree of local participation in management or

[476 US 491]

The complaint further alleged that cable operators are First Amendment speakers, *id.*, at 3a, that there is sufficient excess physical capacity and economic demand in the south central area of Los Angeles to accommodate more than one cable company, *id.*, at 4a, and that the City's auction process allowed it to discriminate among franchise applicants based on which one it deemed to be the "best." *Id.*, at 6a. Based on these and other factual allegations, the complaint alleged that the City and DWP had violated the Free Speech Clause of the First Amendment, as made applicable to the States by the Fourteenth Amendment, §§ 1 and 2 of the Sherman Act, **[476 US 492]** the California Constitution, and certain provisions of state law. *Id.*, at 11a-19a.

The City did not deny that there was excess physical capacity to accomodate more than one cable television system. But it argued that the physical scarcity of available space on public utility structures, the limits of economic demand for the cable medium, and the practical

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ownership reflecting the ethnic and economic diversity of the franchise area, the capacity to provide 52 channels and 2-way communication, the willingness to set aside channels for various public purposes and to provide public access facilities, the willingness to develop other services in the public interest, the criminal and civil enforcement record of the company and its principals, the degree of business experience in cable television or other activities, and the willingness to engage in creative and aggressive affirmative action. *Id.*, at 98a, 101a-102a, 105a, 108a-109a. Respondent did not submit a bid in response to this solicitation, and the franchise was eventually awarded to another cable operator.

and esthetic disruptive effect that installing and maintaining a cable system has on the public right-of-way justified its decision in to restrict access to its facilities to a single cable television company. 754 F.2d, at 1401.

The District Court dismissed the free speech claim without leave to amend for failure to state a claim upon which relief could be granted. See Fed. Rule Civ. Proc. 12(b)(6). It also dismissed the antitrust claims, reasoning that petitioners were immune from antitrust liability under the state-action doctrine of *Parker v. Brown*, 317 U.S. 341 (1963). Finally, it declined to exercise pendent jurisdiction over the remaining state claims.

The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. 754 F.2d 1396 (1985). It upheld the conclusion that petitioners were immune from liability under the federal antitrust laws. *Id.*, at 1411-1415. But it reversed the District Court's dismissal of the First Amendment claim, and remanded for further proceedings. *Id.*, at 1401-1411. It held that, taking the allegations in the complaint as true, *id.*, at 1399, the City violated the First Amendment by refusing to issue a franchise to more than one cable television company when there was sufficient excess physical and economic capacity to accommodate more than one. *Id.*, at 1401-1405, 1411. The Court of Appeals expressed the view that the facts alleged in the complaint brought respondent into the ambit of cases such as *Miami Herald Publishing Co. v Tornillo*, 418 U.S. 241 (1974), rather than of cases such as *Red Lion Broadcasting Co. v. FCC*, 394 U.S. 367 (1969), **[476 US 493]** and *Members*

of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984). 754 F.2d, at 1403-1411.

We agree with the Court of Appeals that respondent's complaint should not have been dismissed, and we therefore affirm the judgment of that court; but we do so on a narrower ground than the one taken by it. The well-pleaded facts in the complaint include allegations of sufficient excess physical capacity and economic demand for cable television operators in the area which respondent sought to serve.[2] The City, while admitting the existence of excess physical capacity on the utility poles, the rights-of-way, and the like, justifies the limit on franchises in terms of minimizing the demand that cable systems make for the use of public property. The City characterizes these uses as the stringing of "nearly 700 miles of hanging buried wire and other appliances necessary for the operation of its system." Brief for Petitioners 12. The City also characterizes them as "a permanent visual blight," *ibid.*, and adds that the process of installation and repair of such a system in effect subjects City facilities designed for other purposes to a servitude which will cause traffic delays and hazards and esthetic unsightliness. Respondent in its turn replies that the City does not "provide anything more than speculations and assumptions," and that the City's "legitimate concerns are easily satisfied

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[2] They also include allegations that the City imposes numerous other conditions upon a successful applicant for a franchise. It is claimed that, entirely apart from the limitation of franchises to one in each area, these conditions violate respondent's First Amendment rights. The Court of Appeals did not reach these contentions, and neither do we.

without the need to limit the right to speak to a single speaker." Brief for Respondent 9.

We of course take the well-pleaded allegations of the complaint as true for the purpose of a motion to dismiss, see, *e.g., Kugler v. Helfant*, 421 U.S. 117, 125-126, n.5 (1975). Ordinarily such a motion frames a legal issue such as the one which the Court of Appeals undertook to decide in this case. **[476 US 494]** But this case is different from a case between private litigants for two reasons: first, it is an action of a municipal corporation taken pursuant to a city ordinance that is challenged here, and, second, the ordinance is challenged on colorable First Amendment grounds. The City has adduced essentially factual arguments to justify the restrictions on cable franchising imposed by its ordinance, but the factual assertions of the City are disputed at least in part by the respondent. We are unwilling to decide the legal questions posed by the parties without a more thoroughly developed record of proceedings in which the parties have an opportunity to prove those disputed factual assertions upon which they rely.

We do think that the activities in which respondent allegedly seeks to engage plainly implicate First Amendment interests. Respondent alleges:

> "The business of cable television, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment. As do newspapers, cable television companies use a portion of their available space to reprint (or retransmit) the communications of others, while at the same time providing some original content." App. 3a.

Thus, through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats. We recently noted that cable operators exercise "a significant amount of editorial discretion regarding what their programming will include." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979). Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers. Respondent's proposed activities would seem to implicate First Amendment interests as do the activities of wireless broadcasters, which were found **[476 US 495]** to fall within the ambit of the First Amendment in *Red Lion Broadcasting Co. v. FCC, supra,* at 386, even though the free speech aspects of the wireless broadcasters' claim were found to be outweighed by the Government interests in regulating by reason of the scarcity of available frequencies.

Of course, the conclusion that respondent's factual allegations implicate protected speech does not end the inquiry. "Even protected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 799 (1985). Moreover, where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests. See, *e.g., Members of City Council v. Taxpayers for Vincent, supra,* at 805-807; *United States v. O'Brien,* 391 U.S. 367,

376-377 (1968). We do not think, however, that it is desirable to express any more detailed views on the proper resolution of the First Amendment question raised by respondent's complaint and the City's responses to it without a fuller development of the disputed issues in the case. We think that we may know more than we know now about how the constitutional issues should be resolved when we know more about the present uses of the public utility poles and rights-of-way and how respondent proposes to install and maintain its facilities on them.

The City claims that no such trial of the issues is required, because the City need not "generate a legislative record" in enacting ordinances which would grant one franchise for each area of the City. Brief for Petitioners 44. "Whether a limitation on the number of franchises . . . is 'reasonable,' " the City continues, "thus cannot turn on a review of historical facts." *Id.*, at 45. The City supports its contention in this regard by citation to cases such as *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980), and *Schweiker v Wilson*, 450 U.S. 221, 236-237 (1981). Brief for Petitioners 45, n.52.

[476 US 496]

The flaw in the City's argument is that both *Fritz* and *Wilson* involved Fifth Amendment equal protection challenges to legislation, rather than challenges under the First Amendment. Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force. But cf. *Ohralk v. Ohio State Bar Assn.*, 436 U.S. 447, 459

(1978). This Court "may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity." *Taxpayers for Vincent*, 466 U.S. at 803, n.22; *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-844 (1978).

We affirm the judgment of the Court of Appeals reversing the dismissal of respondent's complaint by the District Court, and remand the case to the District Court so that petitioners may file an answer and the material factual disputes between the parties may be resolved.

It is so ordered.

SEPARATE OPINION

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE O'CONNOR join, concurring.

I join the Court's opinion on the understanding that it leaves open the question of the proper standard for judging First Amendment challenges to a municipality's restriction of access to cable facilities. Different communications media are treated differently for First Amendment purposes. Compare, *e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), with *FCC v. League of Women Voters of California*, 468 U.S. 364, 380 (1984). In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis. As this case arises out of a motion to dismiss,

we lack factual information about the nature of cable television. Recognizing these considerations, **[476 US 497]** *ante*, at 493-494, the Court does not attempt to choose or justify any particular standard. It simply concludes that, in challenging Los Angeles' policy of exclusivity in cable franchising, respondent alleges a cognizable First Amendment claim.

13 F.3d 1327

PREFERRED COMMUNICATIONS, INC.,
Plaintiff-Appellant,

v.

CITY OF LOS ANGELES; Department of Water and Power, Defendants-Appellees.

PREFERRED COMMUNICATIONS, INC.,
Plaintiff-Appellee,

v.

CITY OF LOS ANGELES; Department of Water and Power, Defendants-Appellants.

PREFERRED COMMUNICATIONS, INC.,
Plaintiff-Appellant,

v.

CITY OF LOS ANGELES; Department of Water and Power, Defendants-Appellees.

PREFERRED COMMUNICATIONS, INC.,
Plaintiff-Appellee,

v.

CITY OF LOS ANGELES; Department of Water and Power, Defendants-Appellants.

Nos. 91-55625, 91-55665, 91-56261 and 91-56269.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 8, 1993.

Decided Jan. 7, 1994.

[13 F.3d 1328] Before: KOZINSKI, SILER,* and KLEINFELD, Circuit Judges.

PER CURIAM:

We revisit some of the issues left open in *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir.1985), *aff'd*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986).

Background[1]

Los Angeles, like most large cities, requires permits for those seeking to provide cable television service to city residents. Under its Charter, the city may grant any "franchise, permit or privilege to erect, construct, lay, maintain and operate, poles, pipes, conduits, wires or cable upon, over, under, in, across or along any street- . . . road or other place . . . for the purpose of . . . communication by telephone, telegraph or signal systems." Los Angeles, Cal., Ordinance No. 58,200, § 2(4). The ordinance specifies that franchises are to be awarded through a process known as a notice of sale ("NOS"). *Id.* § 5; *see also* CR 450 ¶ 34.

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* The Honorable Eugene E. Siler, Jr., United States Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

[1] The facts are set out in detail in our opinion in *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir.1985), and in the Supreme Court opinion affirming that decision. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986). We merely summarize them here.

To adapt the general franchise process to cable television, in 1976 the city developed a "Cable Communications in Los Angeles Master Plan." CR 158 ¶ 6, CR 175 ¶ 6. Under this plan, the city is divided into fourteen cable franchise areas; each area is served by one cable operator. CR 114 exh. A, at 5-6. Once the city decides to issue an NOS for an area, it receives bids; if it decides to award a franchise, it must award it to the highest "responsible" bidder, which means that considerations other than the dollar amount of the bid are taken into account. CR 114, exh. A, at 18-19.

In 1980, the city issued an NOS for cable service in South Central Los Angeles. It received three applications, but no franchise was awarded. CR 114, exh. A, at 30. In 1982 the city issued another South Central NOS. Only one application was received, and the city granted the applicant the South Central franchise. *Id.*, exh. H.

Preferred Communications, Inc., was formed in 1983 to provide cable service to South Central Los Angeles. Since it didn't exist at the time of either the 1980 or 1982 NOS, it participated in neither. In 1983 Preferred requested pole attachment service – permission to lease space on utility poles to string the necessary cable wires – from Pacific Telephone and Telegraph Company and the Los Angeles Department of Water and Power. Each utility informed Preferred that it would first have to obtain a franchise from the city. CR 191 ¶ 8-9. Preferred then asked the city for a franchise. It was informed that the city would issue only one franchise to each area, and that the franchise in South Central had already been awarded. *Id.* ¶ 10. Preferred wrote several letters to the city

requesting a franchise, but [13 F.3d 1329] another NOS was never offered. *Id.* ¶¶ 11-15.

Preferred then sued the city, alleging that the cable franchising system violated the Federal and California constitutions. Preferred claimed that the provision of the city Charter used for franchising, and the procedures which had grown up around it, violated the First Amendment's free speech and free press guarantees. Preferred sought both injunctive and monetary relief.

The district court dismissed Preferred's complaint for failure to state a claim. We reversed, holding that the activity Preferred sought to engage in – providing cable service – was entitled to First Amendment protection. Taking as true the allegations in Preferred's complaint, we held that the city could not limit the award of franchises to a single operator in each area of the city, if the city's infrastructure was capable of accommodating additional providers. 754 F.2d at 1411 (*Preferred I*).

The Supreme Court affirmed our decision, but did so "on a narrower ground." 476 U.S. 488, 493, 106 S.Ct. 2034, 2037, 90 L.Ed.2d 480 (1986) (*Preferred II*). The Court recognized that Preferred's "factual allegations implicate[d] protected speech," *id.* at 495, 106 S.Ct. at 2038, but remanded to the district court for the development of a record on "the present uses of the public utility poles and rights-of-way and how respondent proposes to install and maintain its facilities on them." *Id.* at 495, 106 S.Ct. at 2038.

On remand the district court decided the case on cross motions for summary judgment. Most notably, the court invalidated the city's one operator/one area policy,

through which the city awarded only one franchise per cable service area. The district court also invalidated several other aspects of the city's franchising scheme[2] and upheld some others.[3] Both sides appeal.

Discussion

I

The city first argues Preferred lacks standing to challenge the franchising scheme. The city's argument is simple: Constructing a cable system requires substantial financial resources and technical knowledge; because Preferred is not capable of meeting these requirements, it cannot challenge the franchising scheme. The city relies on *Nor-West Cable Communications Partnership v. City of St. Paul*, 924 F.2d 741 (8th Cir.1991), for the proposition that cable operators who are not "ready, willing and able" to build a cable system cannot challenge such schemes. *Id.* at 749.

Nor-West, however, is not entirely on point. The *Nor-West* court had the benefit of a special jury verdict.

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[2] The court struck down requirements dealing with "mandatory access/leased access" channels, "character," "state of the art," "option to buy," "uninterrupted service," "term of years," "application, filing fee and good faith deposit," "public access production facilities," "equipment and staff," "character generators," and "Cable Franchise Advisory Board." CR 520 at 2.

[3] The court found the "universal service," "localism," "prohibition of transfer" without consent, "franchise fee," "free access" to cable facilities for the city, "recourse and indemnity," "financial and technical qualifications," "customer service," "inspection of property and records," and "Notice of Sale Process" each to be constitutional. CR 520 at 2-3.

Among the jury's findings were that Nor-West was incapable of providing the necessary technical capability or the financial resources to construct a cable system. *Id.* at 744-45. But the jury also found that, even had Nor-West been given the opportunity to build the cable system, it would not have done so. *Id.* at 745. The Eighth Circuit concluded Nor-West lacked standing because it "was not willing or financially able to compete." *Id.* at 749. *Nor-West* is distinguishable because it rested in part on the fact that the cable company was unwilling to build a cable system. Nothing in the record here suggests that Preferred doesn't intend to build a South Central cable system if it's awarded the franchise; in fact, the record is to the contrary. *See, e.g.*, CR 174, exh. 3 at 3; CR at 191 ¶ 2.

It is clear that Preferred has a concrete stake in this litigation; if it prevails in getting the monopoly requirement invalidated, it will have removed a major obstacle preventing it from receiving the franchise permit. *See Bullfrog Films, Inc. v. Wick*, 847 F.2d **[13 F.3d 1330]** 502, 506-08 (9th Cir.1988). This in itself affords it standing since Preferred will have increased its ability to compete for the franchise, despite its inability to prove it ultimately will be awarded one.

We therefore turn to the merits.

II

It is now well established that regulation of cable operators implicates both the Free Speech and Free Press Clauses of the First Amendment. *See, e.g., Leathers v. Medlock*, 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991); *Preferred II*, 476 U.S. at 494, 106 S.Ct. at 2037; *see*

also Preferred I, 754 F.2d at 1403. The district court struck down the one operator/one area provision of the franchising scheme as inconsistent with the First Amendment. Although the court found the interests asserted by the city to be substantial, it nonetheless concluded that the limitation to only one operator was not narrowly tailored because it was not persuaded "that the disruption and safety hazards would be sufficiently significant as to preclude but one cable operator from exercising its speech rights." CR 338 at 16.

We begin with what we said in *Preferred I*, where we framed the issue of the one area/one operator policy as follows:

> Can the City, consistent with the First Amendment, limit access by means of an auction process to a given region of the City to a single cable television company, when the public utility facilities and other public property in that region necessary to the installation and operation of a cable television system are physically capable of accommodating more than one system? *Our answer is no, the City cannot.*

754 F.2d at 1411 (emphasis added).[4]

Nothing has occurred since *Preferred I* to change this analysis. Indeed, the critical fact the city then disputed –

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[4] The city argues that *Preferred I* is not law of the case since the Supreme Court affirmed on different grounds. The precise status of one of our opinions which has been affirmed by the Supreme Court on different grounds is uncertain. Does it continue to be the law of the case? Circuit precedent? We need not decide because we agree with the analysis in *Preferred I* and hew to it today.

whether the utility infrastructure could accommodate a second system – the city has now conceded. *See* CR 338 at 15.

On this appeal, the city asserts essentially the same interests we found inadequate in *Preferred I* to support the one operator/one area requirement. The only difference is that, instead of resting on mere allegations, the city has now come forward with evidence to prove up each of its interests. As this case was decided by the district court on summary judgment, we accept as true the city's evidence; our analysis in *Preferred I* nonetheless disposes of most of the city's interests as a matter of law.

The city first argues it has a substantial interest in preventing the disruption and visual blight caused by additional cable wiring. It claims that further cable systems would force the rearrangement and replacement of existing utility poles and that the installation of another system would pose safety hazards to the public who use the streets and to the DWP employees who must work on the poles. *See, e.g.*, CR 282 ¶¶ 14-16; CR 175 ¶ 29; CR 452 ¶¶ 37-38. The city's proof doesn't alter the analysis in *Preferred I*, which assumed these were substantial interests. *Preferred I* held that limiting the market to a single cable operator was not narrowly tailored to advance the government's interests. *See* 754 F.2d at 1406. There is nothing in this record to change that conclusion, and we adhere to it.

The same concerns that underlay Judge Sneed's excellent opinion in *Preferred I* trouble us as well: "[A]llowing only the single company selected through the franchise auction process to erect and operate a cable

system in each region" exacts too heavy a toll on the First Amendment interests at stake here. 754 F.2d at 1406. Competition in the marketplace of ideas – as in every other market – leads to a far greater diversity of viewpoints (and better service) than if a single vendor is granted a crown monopoly. *See generally* Jan Bellamy, *Two Utilities are Better than One*, Reason, Oct. 1981 (describing competitive electric utility industry). The risk that a single operator will be cap- **[13 F.3d 1331]** tured by city hall (or in turn will capture regulators) is far greater than where two or more operators face off against each other and must contend with the harsh realities of competition.

This is not to say that the city must grant access to its utility infrastructure to "all cable-television comers, regardless of size, shape, quality, qualifications or threat to the ultimate capacity of the system." *Pacific West Cable Co. v. City of Sacramento*, 798 F.2d S53, 355 (9th Cir.1986). Once the city awards a second franchise, the First Amendment calculus may shift. The marginal benefits of another operator will be considerably less when the monopoly is broken and competition is introduced; at the same time, the burden on the city will increase as more cable systems are added. There will thus surely come a point where the city may refuse to grant an additional cable franchise because the added benefit of another franchise is low while the cost in terms of the city's utility-carrying capacity is high. We hold today only that limiting speech to a single operator is "substantially broader than necessary to achieve the government's interest," and therefore invalid. *Ward v. Rock Against Racism*, 491 U.S. 781, 800, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989).

Admittedly, performing the delicate balancing task we outline here is not easy, but the city has painted itself into this corner by conflating the programming and utility functions of cable. For First Amendment purposes, we are concerned primarily about restrictions on programming, not on stringing wires or digging trenches; without the signals transmitted along the wires, cable is basically like any other utility, which may be regulated without implicating the First Amendment. The city's decision to permit a single operator to not only build the cable plant but also provide all of the programming transmitted on it means that *all* regulations – even those which relate only to the construction of the plant – are subjected to demanding First Amendment scrutiny because of their direct impact on programming. By contrast, if the city allowed only one company to construct the cable infrastructure but required it to carry programming from multiple sources, the questions we faced would be different. We need not resolve those questions today.

The city also argues, as it did in *Preferred I*, that the physical scarcity of its utility infrastructure justifies the one area/one operator requirement. The city has conceded, however, that its infrastructure could accommodate at least one further cable system. CR 338 at 15. The essence of the city's argument, therefore, is not that there is no space whatsoever for another cable system but that permitting additional cable systems will bring South Central's utility infrastructure closer to exhaustion. The city claims it may need additional space to expand existing uses or to provide novel, undiscovered services. CR 282 ¶¶ 35-41. At bottom, then, the city would rather reserve the space for some other uses than give it to Preferred.

This too, we considered and rejected in *Preferred I:* "We cannot accept the city's contention that, because the available space on such facilities is to an undetermined extent physically limited, the First Amendment . . . permit[s] it to restrict access and allow only a single cable provider to install and operate a cable television system." 754 F.2d at 1404.[5] Given the city's concession that at least one more cable system can be added, the reasoning of *'Preferred I* controls.

The city does advance one interest that was left open in *Preferred I:* That only one cable system can profitably operate in South Central and the city therefore has an interest in creating a regulated monopoly to operate a franchise. This is the so-called "natural mo- **[13 F.3d 1332]** nopoly" argument which has been rejected as a justification for regulation of print media. *See Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241, 254, 258, 94 S.Ct. 2831, 2837,

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[5] We note also that the city already has an alternative way of ensuring the availability of space for future uses if and when it becomes necessary. The California Public Utility Code provides that, in the event additional space is needed, the cable company must either surrender its occupation of the poles or bear the expense of creating additional capacity. *See* Cal.Pub.Util.Code § 767.5(d). Given that state law already provides a mechanism by which the city may obtain additional space, a monopoly policy is not narrowly tailored to further the city's interest.

Admittedly, this alternative is not without costs. Even if the cable operator pays to reconfigure the wires and erect new poles, the city will still suffer significant disruption. We have already recognized that these are substantial interests, yet for the same reasons already given the monopoly policy is not narrowly tailored to further those interests.

2840, 41 L.Ed.2d 730 (1974); *see also Preferred I*, 754 F.2d at 1405 (expressing doubts about natural monopoly theory).

There are important differences between print and cable media, however. Most significant is that cable systems place a strain on public resources: They disrupt traffic and take up public easements and rights of way. Unlike newspapers, a "cable company must significantly impact the public domain in order to operate." *Community Communications Co., Inc. v. City of Boulder*, 660 F.2d 1370, 1379 (10th Cir.1981). The economic oddities of cable, coupled with the burden on public resources caused by the entry – and exit – of additional operators, may arguably justify some limitations on the number of operators. *Id.; see also Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 128 (7th Cir.1982) (Posner, J.). But this is just another way of expressing the city's interest in avoiding traffic disruption and visual blight, which we have already disposed of. *See* pp. 1330-1331, *supra*. Repackaging these interests under the rubric of natural monopoly makes them no more compelling. For the reasons discussed above, the one operator/one area limitation is not narrowly tailored to advance this interest. We emphasize again: The city may restrict the number of entrants into the cable market, but it may not restrict the number to only one.[6]

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[6] Though we are aware of the 1992 Cable Television Consumer Protection and Competition Act, 47 U.S.C. § 541, our ruling today does not implicate it since the parties agreed it was not relevant.

III

Unresolved issues remain: In addition to the monopoly policy, the court below struck down many other aspects of the city's franchising scheme, and it upheld some others. Our review of these requirements is at best difficult and at worst advisory, because Preferred did not participate in the 1982 NOS and has never actually applied for a South Central cable franchise.

In *Preferred I*, the city argued Preferred lacked standing to even challenge the franchise scheme because it had failed to participate in the 1982 auction. We disagreed, finding that Preferred had standing, having "been barred from access because of its refusal to enter the bidding process and abide by the City's numerous conditions." 754 F.2d at 1402-03.

Preferred I dealt only with whether Preferred had standing to challenge the 1982 NOS; it didn't address the effect, if any, of Preferred's efforts to obtain a second franchise after the initial one was awarded. Counsel for Preferred informed us at oral argument that Preferred had in fact tried to get a South Central franchise in 1983 but was rebuffed because of the monopoly policy. Upon further questioning, counsel conceded that Preferred had never formally applied to the city for a South Central franchise nor petitioned for a waiver of the one area/one operator requirement. Rather, it made an informal inquiry, was told that only one franchise could be awarded and pressed no further. The city argues forcefully that we can only speculate what would have happened if Preferred had actually applied.

We agree this is all pretty speculative, but the city, not Preferred, is to blame. Preferred claims that applying would have been a costly and futile gesture, and that its few informal attempts to find out about the possibility of a second franchise were brushed aside by city officials because of the established monopoly policy. Preferred was justified in believing that a formal application would have been futile: Upon questioning, the city's lawyer admitted that it had never granted a second franchise in any of the fifteen cable areas in Los Angeles, and that there are no plans to do so.

Given that we hold the one operator/one area policy is invalid, the city must make available through an appropriate NOS at least one additional franchise for South Central Los Angeles. While we decline Preferred's request that we order the city to actually grant that franchise to it, the invalidation of the monopoly policy means that the obstacle preventing Preferred from applying [13 F.3d 1333] before has now been removed from its path. Preferred will have an opportunity to apply and compete for a South Central franchise. Should it choose to do so, this will tell us several important things.

First, we will learn whether Preferred is in fact "ready, willing and able" to operate a cable system. The city must issue another request for proposals pursuant to its Cable Communications Master Plan; if Preferred fails to participate, we will know it has suffered no injury from the franchise scheme. Alternatively, Preferred may apply but be denied the franchise on the basis that it lacks the requisite technical or financial qualifications. Again, if that's so, Preferred will lack standing to proceed with this litigation. It's also possible Preferred will be

denied a franchise because it failed to satisfy one of the disputed requirements; in that case, we will be able to review the requirement's constitutionality without having to speculate as to its operation or relation to the overall scheme. The franchise may also be awarded to another operator who makes a more attractive bid, in which case Preferred will have no standing to challenge any of the restrictions placed on that franchisee. Finally, the auction may result in the award of a franchise to Preferred. If that happens, then all of Preferred's claims for injunctive relief will become moot.

Moreover, the invalidation of the monopoly policy – the heart of the city's franchise system – may significantly alter the rest of the scheme. Many of the provisions, such as universal service, may make sense in the context of a regulated monopolist but will be unnecessary or counter-productive once competition is introduced. And while we express no view on the rest of the district court's order, the city may well heed the concerns of the learned district judge who found that may of the provisions violated the First Amendment. All government officials have a duty to uphold the United States Constitution, and we're confident that Los Angeles' officials are mindful of this responsibility.

Since there are so many ways we might well avoid having to confront these difficult constitutional issues, it would be precipitous of us to reach them at this time. Were we to try, we would have to "decide the legal questions posed by the parties without a more thoroughly developed record . . . ," *Preferred II*, 476 U.S. at 494, 106 S.Ct. at 2037, something the Supreme Court refused to do when reviewing our last opinion. *Id.* If we

failed to follow the Court's example, "we would not escape the charge of rendering advisory opinions poorly disguised as sweeping dicta." *Preferred I*, 754 F.2d at 1401.[7]

IV

The district court awarded Preferred injunctive relief and $1 in nominal damages. Preferred sought monetary damages in the form of lost profits from its failure to receive a franchise. The district court denied the request. CR 248 ¶ 9. Preferred then restyled its damages theories as claims for "lost asset value" and "additional construction costs" from the delay caused by the city's refusal to let Preferred compete for a franchise. The court ruled that the invalidation of parts of the franchising scheme did not "automatically confer [on Preferred] the right to install a cable system in the South Central area," rendering any claim for damages too speculative. CR 343 at 4.

Preferred's claim for "lost asset value" is based on the difference in value between a cable system constructed in 1983 and one constructed in 1988; it is merely another way of measuring lost profits. *See Los Angeles Memorial Coliseum Comm'n v. NFL*, 791 F.2d 1356, 1374 (9th Cir.1986); *cf. Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke*

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[7] Moreover, on remand the district court will likely receive further guidance from the Supreme Court's opinion in *Turner Broadcasting System v. FCC*, as the Supreme Court has just noted probable jurisdiction in that case. ___ U.S. ___, 114 S.Ct. 38, 125 L.Ed.2d 787 (1993).

& Liquors, Ltd., 416 F.2d 71, 87 (9th Cir.1969). This measure of damages assumes that Preferred would have actually built a cable system in 1988. "Additional construction costs," which measures the differences between the cost of building a system in 1983 and now, depends on the same assumption, as well as the further assumption that Preferred would and could build a system now if it were allowed to compete for a franchise.

While we have rejected the city's position that Preferred lacks standing because it is **[13 F.3d 1334]** not "ready, willing and able" to finance and construct a cable system, the arguments advanced by the city do bear on the question of damages. The difficulty with Preferred's claims for damages is that they all depend on the very speculative assumption that Preferred would have built and operated a profitable cable franchise in South Central if it had only been given the chance. It's not clear this is so. While we're confident that Preferred genuinely wants and intends to build a cable system if awarded a franchise, the parties hotly contest whether Preferred actually has the technical or financial capacity to do so; and even if Preferred does, there may well be other more qualified operators who would receive the franchise instead. While Preferred is entitled to a chance to compete for a franchise, any claim for damages is much too speculative. *See, e.g., Putnam v. Lower*, 236 F.2d 561, 571-73 (9th Cir.1956).

The same problem also plagues Preferred's claim for "general and presumed damages," which it didn't raise below but urges on appeal. While *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 310-11, 106 S.Ct. 2537, 2544-45, 91 L.Ed.2d 249 (1986), permits an award of "presumed damages" when a constitutional injury is

"likely to have occurred but [is] difficult to establish," the issue here is not one of quantifying the damages but whether Preferred actually suffered an injury at all. If we could know with certainty that "but for" the city's monopoly policy Preferred would have received the franchise, presumed damages might "approximate the harm that [Preferred] suffered and thereby compensate for harms that may be impossible to measure." *Id.* at 311, 106 S.Ct. at 2545. But we cannot know with certainty whether Preferred would even have received the franchise; its claim for "presumed damages" is just as speculative as its other damage claims.[8]

Conclusion

The district court's order invalidating the one operator/one area requirement is AFFIRMED; the order denying monetary relief as to all claims is AFFIRMED; the rest of the district court's order is VACATED and the case is REMANDED. On remand the district court shall retain jurisdiction and, if the city fails to offer another franchise

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[8] We are aware that Congress recently prohibited damages claims against municipal governments for claims arising from cable franchising. *See* 47 U.S.C. § 555(a). At oral argument, counsel for Preferred argued that this prohibition was unconstitutional because it singled out cable as compared to other members of the press. *But cf. Leathers v. Medlock*, 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991) (sales tax which singles out cable operators doesn't offend First Amendment). Because we conclude Preferred was not entitled to damages under any of its theories, we do not reach this question of constitutional dimension. *See Ashwander v. TVA*, 297 U.S. 288, 346, 56 S.Ct. 466, 482, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).

for bidding within due course, the district court shall order the city to do so. *See Brown v. Board of Educ.*, 349 U.S. 294, 300-01, 75 S.Ct. 753, 756-57, 99 L.Ed. 1083 (1955) (*Brown II*) (enforcement order). We AFFIRM the district court's rulings as to attorney's fees, Rule 11 sanctions and dismissal of the RICO claims in unpublished memoranda also filed today.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PREFERRED COMMUNICATIONS, INC., Plaintiff, v. CITY OF LOS ANGELES and the DEPARTMENT OF WATER AND POWER, Defendants.	No. CV 83-5846 (CBM) (Bx) JUDGMENT (Entered Apr. 11, 1991)

This matter came before the Court on the various motions and cross-motions of both parties for partial summary judgment and for summary judgment. The Court issued orders reflecting rulings on those motions on the following dates: May 23, 1989; May 25, 1989; June 7, 1989; June 13, 1989; January 5, 1990; August 24, 1990.

Judgment is hereby entered in favor of plaintiff on the following claims:

1. The one area/one operator requirement is unconstitutional.

2. The mandatory access/leased access requirement is unconstitutional.

3. The character requirement is unconstitutional.

4. The state-of-the-art requirement is unconstitutional.

5. The option to buy requirement is unconstitutional.

6. The uninterrupted service requirement is unconstitutional.

7. The term of years requirement is unconstitutional.

8. The application, filing fee and good faith deposit requirements are unconstitutional.

9. The requirement that a cable operator provide public access production facilities, equipment and staff available for noncommercial programming purposes is unconstitutional.

10. The requirement that a cable operator provide character generators and portable production facilities is unconstitutional.

11. The Cable Franchise Advisory Board requirement is unconstitutional.

Judgment is hereby entered in favor of defendants on the following claims:

12. Plaintiff cannot recover damages for lost profits and any damage claims other than for compensatory damages.

13. Plaintiff has failed to meet its burden of proof with respect to its RICO and antitrust claims against the City.

14. The City's universal service requirement is not unconstitutional.

15. The community participation ("localism") requirement is constitutional.

16. The prohibition of transfer requirement is constitutional.

17. The 5% franchise fee requirement is constitutional.

18. The provision granting the City free access to cable facilities is constitutional.

19. The recourse and indemnity requirements are constitutional.

20. The financial and technical qualifications requirements are constitutional.

21. The customer service requirements are constitutional.

22. The inspection of property and records requirements are constitutional.

23. The Notice of Sale Process is constitutional.

24. Plaintiff cannot receive special damages for expert witness fees.

IT IS FURTHER ORDERED AND ADJUDGED:

That plaintiff recover of the defendants the sum of $1.00 in nominal damages;

That any application for award of statutory costs and/or attorneys' fees may be made as otherwise permitted by law and the rules of this Court, but the filing of the same shall not delay entry of final judgment herein.

The Clerk is hereby directed to enter this final judgment forthwith.

IT IS SO ORDERED.

DATED: March 26, 1991

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL,
JUDGE
UNITED STATES DISTRICT
COURT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PREFERRED COMMUNICATIONS, INC., Plaintiff, v. CITY OF LOS ANGELES, CALIFORNIA and the DEPARTMENT OF WATER AND POWER, Defendants.	CASE NO. CV 83-5846 (CBM) MEMORANDUM ORDER (Filed Jan. 5, 1990)

This matter came on for hearing on December 4, 1989 in the above-entitled Court, the Hon. Consuelo B. Marshall, Judge presiding, on, inter alia, three motions for partial summary judgment by defendants City of Los Angeles ("the City") and the Department of Water and Power ("DWP") and on the motion of plaintiff Preferred Communications, Inc. ("plaintiff" or "Preferred") for "further" summary judgment.

Having read the moving and opposing papers and reviewed the relevant evidence and having heard oral argument, the Court hereby issues the following memorandum order:

FACTS/BACKGROUND

The City requires every cable television company to have a municipal franchise in order to construct, maintain or operate any cable television system anywhere in the

City. The City awards cable franchises through certain procedures which it has established.

The franchises are allocated through an auction process. The City issues a Notice of Sale and Request for Proposals ("NOS") to each prospective cable operator/bidder for an available cable television franchise, and awards the franchise to the highest responsible bidder.

The City's cable television franchising scheme divides the City into franchise service areas. South Central Los Angeles – the area in controversy herein – is one such area. The City awards only one cable franchise in each of its franchise service areas, including South Central Los Angeles.

The City requires companies wishing to participate in the auction process to submit to a variety of conditions. Those relevant to the present controversy include the following:

1) The NOS states that an important consideration in the selection of a cable franchisee is "the participation of individuals and/or groups from the local community in the ownership and operation of the cable system." NOS, p. 6.

2) The City franchising procedures allow the City to purchase the franchisee's property at below a fair market value, prohibit the franchisee from selling its cable television system without the City's consent, prohibit the franchisee from withdrawing service without the City's consent and may compel the franchisee to continue its services after its franchise has expired or been revoked.

3) The City considers the overall character of a cable franchise bidder and its principals in deciding who should be awarded cable franchise, and chooses the operator it deems "best" for each franchise service area.

4) The City requires a franchise bidder to agree to provide various mandatory access channels, including: two channels for use by the City and other government entities, two channels for use by educational institutions, and channels for use by the general public. Bidders must also agree to provide two leased access channels.

5) The City requires that a cable franchise bidder operate and maintain a state-of-the-art cable television system which includes at least 52 channels of video service and interactive (two-way) service.

6) The City requires that a cable franchise bidder agree to provide its service universally, i.e. to all in the franchise area.

In 1983, Preferred sought permission from the City to access the City's utility poles so that Preferred could deliver cable television service to the residents of the South Central area.

In seeking access to the City's utility poles and conduits, Preferred refused and, in subsequent requests to gain access to said poles and conduits, continues to refuse to comply with the City's franchise application procedures. Consequently, the City has refused Preferred's requests for a cable franchise in the South Central area.

Preferred challenges the constitutionality of those franchising criteria and requirements listed above,

including the limit of one cable operator per cable franchise area. These requirements shall hereinafter be referred to as follows: the "one area/one operator" requirement; the "community participation" or "localism" requirement; the "character" requirements; the "access" requirements"; the "state-of-the-art" requirements; the "sale/duration of service" requirements; and the "universal service" requirement.

The issues raised by the present motions for summary judgment originally came before the Court on defendants' (the City and DWP) Motion for Summary Judgment on Merits of Plaintiff's First Amendment Claim which was heard on March 20, 1989. The Court issued an order on that motion on June 14, 1989. In the June 14 Order, the Court held that the applicable test for deciding the constitutionality of the cable franchising requirements challenged in this case is the test set forth by the Supreme Court in *U.S. v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, *reh'g denied*, 393 U.S. 900 (1968).

In *O'Brien*, the Supreme Court upheld the constitutionality of federal statutes prohibiting the destruction or mutilation of "draft" (conscription) cards. The Court explained

> " . . . when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficient important government interest in regulating the non-speech elements can justify incidental limitations on first amendment freedoms." *Id.* 88 S.Ct. at 1682, 1683.

The Supreme Court further articulated that the speech/non-speech government regulation is sufficiently justified if:

> . . . it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien*, 88 S.Ct. at 1679.

In *Quincy Cable T.V., Inc. v. F.C.C.*, 768 F.2d 1434 (D.C. Cir. 1985), the D.C. Circuit drew the distinction between "incidental" burdens on speech and restrictions that are "intended to curtail expression" as follows

> " 'incidental' burdens on speech [are] regulations that evince a governmental interest unrelated to the suppression or protection of a particular' set of ideas – [then there are] restrictions that are intended to curtail expression which directly [ ] ban [ ] speech because of . . . its communicative or persuasive effect on its intended audience . . . or indirectly [ban speech] by favoring certain classes of speakers over other . . . " *Id.* at 1450 quoting *Home Box Office, Inc. v. F.C.C., supra*, 567 F.2d 9, 47-48 (D.C. Cir.) *cert. denied*, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977).
>
> "If the regulation falls in the former category, it will be sustained if 'it furthers an important or substantial governmental interest . . . and if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest' (citations omitted). If however, the regulation cannot fairly be understood as a merely incidental restriction on expression, the regulation will be upheld, if at

> all, only if the government adequately carries a significantly heavier burden of justification."

Quincy, at 1450-1451.

Applying the standards and terminology set forth in *O'Brien* and *Quincy* to each of the franchising requirements challenged by plaintiff in this case, the Court in its June 14 order held:

1) The "one operator/one area" requirement is a "non-incidental" regulation of speech subject to a high level of judicial scrutiny.

2) The "community participation" requirement is a non-incidental regulation of speech.

3) The "sale/duration of service" requirements are incidental burdens of speech.

4) The "character" requirement is a non-incidental burden on speech.

5) The "mandatory access/leased access" requirements are non-incidental burdens on speech.

6) The "state-of-the-art" requirement creates an incidental burden on speech.

7) The "universal service" requirement creates an incidental burden on speech.

As to the "one operator/one area" requirement, the Court found that the constitutionality issue should be left to the jury because a triable issue of fact existed as to whether the South Central Los Angeles area can maintain more than one cable operator. Further, the Court found the City's "universal service" requirement constitutional.

However, as to the remaining requirements, the Court ordered: "If the parties believe that insufficient evidence has been provided to the Court, but now, being aware of the standard which the Court has applied in this case (*O'Brien*), believe that there is a basis for prevailing on a motion for summary judgment, then either plaintiff or defendant may file another summary judgment motion on this issue." June 14, 1989 Order, pp. 9-10.

In response to the Court's June 14 order, the parties have filed four separate motions between them. These are: 1) plaintiff's motion in support of further motion for summary judgment ("plaintiff's motion"); 2) defendants' motion for summary judgment on the "one area/one operator" requirement ("defendants operator motion"); 3) defendants' motion for summary judgment on the "access/community participation" requirements ("defendants' access motion"); and 4) defendants' motion for summary judgment on the "character", "state-of-the-art" and "sale/duration of service" requirements ("defendants' character motion").

DISCUSSION

The issues and arguments set forth in plaintiff's motion dovetail extensively with those in defendants' motions. Accordingly, the Court shall discuss each of defendants' motions in conjunction with the corresponding portion of plaintiff's motion. Specifically, each of the aforementioned requirements now being challenged shall be analyzed in turn. First, however, the Court shall set forth the proper summary judgment standard.

Summary judgment standard

In *California Architectural Bldg. Products v Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 689 (1988), the Ninth Circuit laid out the following Supreme Court guidelines for deciding a summary judgment motion:

First, if the non-moving party will bear the burden of proof with respect to an element essential to its case, and that party fails to make a sufficient showing to establish a genuine dispute of fact with respect to the existence of the element, summary judgment is appropriate. *California Architectural* at 1468, citing *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552-2553, 91 L.Ed. 265 (1986).

Second, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *California Architectural* at 1468, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 2424, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Finally, if the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *California Architectural* at 1468, citing *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

In First Amendment cases, the government always bears the burden of proving the constitutionality of the

alleged speech-infringing ordinances. *N.A.A.C.P. Western Region v. City of Richmond*, 743 F.2d 1346, 1351 (9th Cir. 1984), citing *Rosen v. Port of Portland*, 641 F.2d 1243, 1246-47 (9th Cir. 1981); *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 317, 100 S.Ct. 1156, 1162, 63 L.Ed.2d 413 (1980).

Thus, as to each of the following franchising requirements/criteria, the defendants bear the burden of proof.

One area/one operator requirement

The defendants assert that the requirement is content-neutral, and under the standard for determining constitutionality for such requirements there is no genuine factual dispute that the South Central area must be restricted to one cable operator. Moreover, defendants maintain, even if applying the highest standard for judicial scrutiny, there is no factual dispute regarding the constitutionality of the one operator requirement.

Proper standard

In the June 14 Order, the Court held that the one operator/one area requirement is a non-incidental regulation of speech subject to the highest level of judicial scrutiny. Order, Conclusion of Law No. 18. The Court further held, "[i]f it is found that the South-Central area utility poles and conduits are physically capable of carrying more than one cable operator, [this requirement] is unconstitutional as it creates a serious risk that city officials will discriminate among cable providers on the basis of the content of, or views in, their proposed programs." Order, Conclusion No. 20.

Defendants contend that the standard set forth by the Court is "erroneous since it requires the Court to displace City officials in deciding how space on the utility infrastructure of the City of Los Angeles will be allocated." Character motion, point, and authorities, p. 3. Defendants further contend that the requirement imposes only an incidental burden of speech and is therefore subject to a lower level of judicial scrutiny than that proposed by the Court in the order.

In support of their argument to lower the standard for judicial scrutiny of the one operator requirement, defendants rely on *Ward v. Rock Against Racism*, ___ U.S. ___, 109 S.Ct. 2746, ___ L.Ed.2d ___ (1989) which was decided after this Court issued its previous order in this case.

However, as plaintiff points out, defendants' entire argument is based on an unsubstantiated construction of one sentence from *Ward*.

The sentence referred to states: "We have held that the *O'Brien* test 'in the last analysis is little, if any different from the standard applied to time, place or manner restrictions.' " *Ward* at 109 S.Ct. 2746 at 2757, *citing Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 198 [sic], 104 S.Ct. 3065, 3071, 82 L.Ed.2d 221 (1984).

Relying on the afore-cited language, defendants assert that the analysis of whether a restriction on speech is "incidental" or "direct" is identical to the analysis of whether a restriction is "content-neutral" under a time, place and manner analysis.

This interpretation of first amendment law is untenable, as a careful analysis of *Ward* reveals.

In *Ward*, the Court applied a time, place and manner analysis to a New York City municipal regulation aimed at controlling the sound levels at rock concerts. In the first portion of the opinion, the court found that the regulation was content-neutral. *Id.* at 109 S.Ct. at 2754, 2755. Then, having made this determination, the Court found the City's regulation "narrowly tailored to serve a significant governmental interest." *Id.* at p. 2756.

Thus, as must be the case here, the Court in *Ward* applied a two-part constitutional analysis. To reiterate, under *O'Brien*, a government regulation will be sustained only if 1) it is within the constitutional powers of the government, 2) if it furthers an important or substantial interest, 3) if the government interest is unrelated to the suppression of free expression and 4) if the incidental restriction is no greater than essential to further that interest. This is the first part of the analysis. However, if a regulation does not meet the *O'Brien* criteria, then it is a "non-incidental" burden on speech. Thus, the second part of the analysis must be completed and the regulation "will be upheld, if at all, if the government adequately carries a significantly heavier burden of justification." *Quincy* at 1450.

Based on the foregoing, the only reasonable interpretation of the afore-cited sentence in *Ward* is not that the standard as a whole is interchangeable with a time, place and manner analysis but, rather, that the initial *O'Brien* portion of the analysis is the same as that for a content-neutral time, place and manner restriction. To

adopt defendants' interpretation of *Ward* would be to skip over the initial step, that is, first determining whether or not the regulation is an incidental burden on speech.

The City articulates the following as its reasons for allowing only on operator per franchise area:

1) To conserve and make efficient use of the City's utility infrastructure (pole space and underground conduits). Supplemental Declaration of Kolacinski, paras. 36, 37; Supplemental Declaration of Joan Milke-Flores, para. 10.

2) To minimize disruption caused by the installation and maintenance of a cable system to the utility infrastructure, public streets and private property. *Id.*

3) To minimize the visual blight created by such a system. *Id.*

4) To minimize safety hazards and risks to DWP employees and others who must install and maintain electric telephone and cable television units and equipment on the utility poles. Supp. Decl., Mitchell Kolacinski, para. 16.

5) To assure cable service to all regardless of income.[1]

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[1] The Court found in its previous order that this is a substantial and important governmental interest in relation to the "universal access" requirement. *See* Order, p. 9.

To reiterate, under *O'Brien*, "incidental" burdens of speech are regulations that evince a governmental interest unrelated to the suppression or protection of a particular set of ideas. *Quincy Cable TV, Inc. v. F.C.C*, 768 F.2d 1434, 1443, *quoting Home Box Office, Inc. v. F.C.C.*, 567 F.2d 47, 48 (D.C. Cir.), 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977).

In considering the interests articulated by the City, the Court finds that they are unrelated to the suppression or protection of ideas. Thus, the one operator requirement imposes only an incidental burden on speech.

Constitutionality of requirement

Since the one operator requirement imposes only an incidental burden on speech, it may be sustained if it "furthers a substantial governmental interest . . . and if the incidental restriction on speech is essential to further that interest." *Quincy, supra.* at 1450

It is important to clarify that incidental burdens on speech are not invalid just because there might be some less burdensome alternatives. In *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540, 1550 (7th Cir. 1989), the Seventh Circuit held "so long as the neutral regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation" an incidental burden on speech is allowed. *Id. citing U.S. v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985).

In the previous order, the Court held that if is [sic] determined that the South Central area is physically capable of carrying more than one cable operator, the one

operator/one area requirement is unconstitutional. Order, p. 8. In so finding, the Court relied on the Ninth Circuit's decision in *Preferred Communications, Inc. v. City of Los Angeles, California*, cite 1396, where the court held that such requirement "creates a serious risk that city officials will discriminate among cable providers on the basis of the content of, or the views expressed in, their proposed programs." *Id.* at 1406.

At the hearing on the present motions, the City conceded on the record that the City infrastructure in the South Central area is physically capable of housing a second cable television operator. This is consistent with the declaration testimony of the City's witness, Mitchell Kolacinski. Supp. Decl., Kolacinski, paras. 35, 37. Thus, there exists no triable issue of fact as to whether it is feasible to place a second cable system in the South Central area.

Defendants contend that even conceding physical feasibility, the integrity of the public domain and other interests the City seeks to protect shall be significantly impaired by allowing a second cable operator and thus, as a matter of law, the Court must find the requirement constitutional.

The Court disagrees. Although most of the City's interests in limiting only one operator to each franchise area are substantial, the Court finds the one operator requirement too restrictive a means of carrying out these interests. The Court acknowledges that there is a dispute between plaintiff and defendants over the degree of disruption that would result from the installation of a second cable television system in the South Central Area.

For purposes of the present motions, the Court accepts defendants' evidence on the disruption and possible safety risks that would ensue. Nevertheless, the Court is not persuaded that the disruption and safety hazards would be sufficiently significant as to preclude but one cable operator from exercising its speech rights.

Thus, the Court finds that the one operator requirement is unconstitutional as a matter of law.

Accordingly, defendants' motion for summary judgment on the one area/one operator requirement is denied and plaintiff's motion, as it pertains to this requirement, is granted.

Community Participation ("Localism") Factor

The NOS, which is part of the cable franchising application package, states that "an important consideration in the selection of an operator will be the participation of the individuals and/or groups from the local community in the ownership and operation of the cable system . . . It is further believed that a locally based company possesses a greater understanding of the problems and needs of the community and will be more responsive by reason of its local ties to the City government and the community." NOS, p. 6. Applicants are further encouraged to demonstrate that local participation will continue on an on-going, long-term basis in order to be awarded a franchise.

As stated earlier, in the previous order, the Court found that the community participation factor or criteria used in selecting a franchisee is a non-incidental burden on speech. Conclusion of Law No. 21.

Defendants contend that 1) the requirement imposes only an incidental burden on speech, 2) the requirement satisfies *O'Brien* because the City's interest would be achieved less effectively absent the requirement, and 3) even if the requirement is non-incidental, it is uncontroverted that the requirement can pass the stricter constitutionality standard.

Proper standard

In asserting the constitutionality of the localism requirement, defendants rely on the language in *Ward, supra,* 109 S.Ct. at 2757, where the Ninth Circuit held that a regulation is content-neutral and an incidental burden on speech, "so long as it is 'justified' without reference to the content of the regulated speech." *Id.* (citations omitted).

Defendants assert in their moving papers that the City's interest in requiring community participation is "to ensure that a cable system in the South Central area is responsive to the unique needs and interests of subscribers in the area, to promote community and cultural pride and diversity and self-expression, and to enhance economic welfare of the residents of the South Central area." Defendants' Access Motion, Memorandum of Points and Authorities, p. 9.

As in its previous order, the Court finds this regulation non-incidental as it, at the very least, indirectly bans speech by favoring speakers "responsive to the needs of the South Central area residents" over others. *See Quincy, supra,* at 1434 (citations omitted).

Thus, in order to prevail on summary judgment, defendants "must carry a significantly heavier burden of justification." *Quincy, supra* at 1451. At this juncture, it is necessary to define this heavier burden.

"Differences in the characteristics of . . . media justify differences in the First Amendment standard applied to them." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 386, 89 S.Ct. 1794, 1804, 23 L.Ed.2d 371 (1969). In determining the standard for the unique medium of cable television, it is useful to visualize the broadcast medium and print medium as occupying opposite ends of the government regulation spectrum. In assessing the constitutionality of a regulation governing the broadcast medium, a more lenient First Amendment standard, i.e., one that allows more governmental regulation, is warranted because of the inherent physical limitations of the airwaves. *See Red Lion, supra,* 395 U.S. 367, 386, 89 S.Ct. 1794, 1804, 23 L.Ed.2d 371 (1969). Conversely, government regulation over the print media must be subjected to the most exacting First Amendment analysis. *See Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974).

The programming of a cable television network, like the publishing of a newspaper, involves editorial discretion. Moreover, unlike broadcast, cable television does not require use of the airwaves. However, the Court recognizes the potential for disruption of the public domain inherent in stringing coaxial cables along the City's utility poles and conduits. Accordingly, the Court places the medium of cable television in between the broadcast media and print media on the governmental regulation continuum, however closer to the print media.

Acknowledging the inherent difficulty in articulating a First Amendment standard of review for non-incidental governmental regulations, the Court nevertheless adopts the language set forth in *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540, 1550 (7th Cir. 1989). There, the Court held that cable franchise requirements which may be characterized as "content-related" "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Id.* at 1550, citing *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540, 100 S.Ct. 2326, 2334, 65 L.Ed.2d 319 (1980) (other citations omitted). The Court interprets the term "precisely drawn" as describing a regulation which does not necessarily provide the least restrictive means of securing a compelling government interest, yet which is not afforded the same relative leeway given to incidental regulations. For instance, the rule in *U.S. v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985), that an incidental regulation is allowed if absent the regulation the government's goal is less effectively achieved, should not apply in the non-incidental context.

Is the government interest compelling?

Defendants rely on the Seventh Circuit opinion in *Chicago Cable Communications, supra* in asserting that the interest in "localism" is compelling.

There, three cable companies were fined by the Chicago Cable Commission, a department of the City of Chicago, for violating the "local origination" ("LO") provision of their respective cable franchise agreements with the City. *Chicago Cable Commission* at 1542.

The Seventh Circuit defined LO programming as programming developed by an individual cable television system specifically for the community it serves. *Id.* at 1543. In *Chicago Cable*, plaintiff companies had allegedly failed to allot the requisite time and money in accordance with the City regulations to LO programming and were consequently fined by the City of Chicago. *Id.*

The cable companies claimed, inter alia, that the Commission's imposition of a fine based partly on the subject matter of its required four and one-half weekly hours of LO programming constituted impermissible content regulation, thereby violating the companies' First Amendment rights to free expression. *Chicago Cable* at 1547, 1548.

The Court in *Chicago Cable* determined that an *O'Brien* analysis was appropriate and that such analysis should begin with an appraisal of whether the interest to be secured by the governmental measure is truly substantial. *Id.* at 1549. If so, the Court held that the next step is to determine the issue of whether the "means chosen are congruent with the desired end or whether it is too broadly tailored to pass constitutional muster." *Id.*

In *Chicago Cable*, the Court found the encouragement of "localism" a "substantial interest," citing the fact that such encouragement not only promotes community self-expression and communications between residents regarding topics of local concern, but also helps provide jobs for residents of Chicago. *Id.* at 1549, 50. Here, however, defendants are required to meet the higher standard of showing a "compelling" interest.

Plaintiff contends that it is not enough for the City to merely state an interest in order to establish "substantiality" or a "compelling" character. Indeed, in *Quincy, supra,* the D.C. Circuit held that "[i]n many circumstances, the mere abstract assertion of a substantial governmental interest, standing alone, is insufficient to justify the subordination of First Amendment freedoms." *Id.* at 1454. The Court explained that "at least in those instances in which both the existence of the problem and the beneficial effects of the agency's response to that problem are concededly susceptible to some empirical demonstration, the agency must do something more than merely posit the existence of the disease sought to be cured." *Id.*

Here, the interests articulated by the City may be broadly categorized as promoting cultural pride, diversity of self-expression and enhancing the economic welfare of the residents of South Central Los Angeles. The Court finds that these interests, in particular the economic interest, are of the type which should be subjected to an empirical demonstration of need.

The defendants offer the declaration testimony of Joan Milke-Flores, Los Angles City Councilwoman for the Fifteenth District. The Fifteenth District includes a portion of South Central Los Angeles. Milke Flores testifies that until July 1989, she served as the chair of the Industry and Economic Development Committee ("IED Committee") of the City Council. Supplemental Declaration of Milke-Flores, para. 4. The IEC [sic] Committee's primary function is to oversee and encourage economic development in the City of Los Angeles. The Committee relies on formal studies and reports in order to serve this function.

One of the Committee's functions is to examine and make recommendations regarding Cable TV matters. Supp. Decl., Milke-Flores, para. 5. Milke-Flores testifies that her experience is that the poorer areas of Los Angeles get poorer quality cable, and that participation of local residents in the operation of cable franchises helps to alleviate the problem. Milke-Flores testifies that the City policy with respect to its "localism" requirement reflects the City's awareness of the ethnic diversity of Los Angeles, and thus fosters ethnic and cultural pride in the residents of the City as well as awareness in the cable operators. Milke-Flores, paras. 36, 37.

South Central Los Angeles has long been recognized as an economically disadvantaged area. Milke-Flores, para. 33. In 1982, the city studied community participation requirements in other parts of the country with similarly economically disadvantaged areas as part of the program to explore policies for community participation in cable franchising locally. Based on the background of Milke-Flores in the economics of the South Central area as they relate to the operation of a cable TV system, the Court finds that her testimony constitutes more than "a mere abstract assertion of a governmental interest." Moreover, the evidence demonstrates that the City engaged in fairly extensive studies with respect to the localism question. Finally, the fact that South Central Los Angeles is an economically disadvantaged area makes the economic interest in imposing a localism requirement compelling.

Plaintiff offers no evidence controverting the evidence offered by defendant or challenging the knowledge

of Milke-Flores.[2] Thus, the Court finds that defendants' interest in requiring community participation in the programming and operation of a cable system is compelling.

Is the requirement precisely drawn?

In *Chicago Cable,* actual monetary and fiscal requirements were imposed with respect to community participation, yet the Court found such requirements were properly tailored to meet the "localism" interest. *Id.* at 1551.

Here, the localism requirement is not a formal requirement at all but, rather, an "important consideration" in the selection of an operator. Thus, it is not necessary for an applicant to meet the community participation requirement in order to be selected as a franchisee. Clearly, this is less of a restriction, if a restriction at all, than that imposed in *Chicago Cable.* Thus, even as the Court herein applies a stricter standard than that applied in *Chicago Cable,* the Court finds the localism criteria constitutional.

Accordingly, the Court grants defendants' motion for summary judgment and denies plaintiff's motion as to this issue.

Mandatory Access/Leased Access requirements

The City requires a franchise bidder to agree to provide various mandatory access channels, including two

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[2] Plaintiff's evidentiary objections to the declarations of Milke-Flores and Susan Herman are discussed in a separate order. Those portions of the declarations the Court found inadmissible are not considered in deciding the present motions.

such channels for the use of the City and other governmental entities, two channels for use by educational institutions, and two channels for use by the general public. In addition, bidders must agree to provide two leased access channels.

In the June 14 Order, the Court found this particular requirement non-incidental. Conclusion of Law, No. 24. Further, the Court ordered the parties to submit further briefs regarding the interest the City hoped to protect by the access requirement with the awareness that the Court would be applying the *O'Brien* standard.

As with the requirements previously discussed, the defendants contend that the access requirement is incidental and that irrespective of which standard of scrutiny is applied, there is no disputed fact as to the constitutionality of the requirement.

Proper standard

The Court believes that its previous ruling that this requirement imposes a non-incidental burden on speech deserves some reconsideration.

Again, defendants assert, citing *Ward, supra,* 109 S.Ct. at 2754, that because the access requirements are "justified without reference to the content of [the cable operators] speech," they are content-neutral and therefore should be viewed as incidental burdens on speech. Defendants rely in part on the congressional reports made in connection with the Federal Cable Act.

The congressional committee examining cable TV policy issues recognized the vulnerability of mandatory

access provisions to first amendment challenges. Nevertheless, the committee found such access provisions consistent with the first amendment because they establish a form of "content neutral structural regulations which will foster the availability of a 'diversity of viewpoints' to the listening audience." 1984 U.S. Code Cong. Admin. News 4655, 4672.

The Committee concluded, in contrasting access schemes for newspapers which have been found unconstitutional, "an access scheme for cable television that requires a cable operator to set aside channel capacity does not chill the cable operators' speech. The right of access is not contingent upon what the cable operator states. It works automatically, and without extensive governmental intervention." *Id.* at pp. 4671, 4672.

Plaintiff contends, on the other hand, that the access requirements directly control speech by precluding the cable operator from speaking over eight of its channels, since these channels must be left completely open to other speakers. Plaintiff relies on the Supreme Court opinion in *Riley v. National Federation of the Blind*, ___ U.S. ___, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). There, a coalition of professional fundraisers challenged the state of North Carolina's "reasonable fee" statute governing the amount of fee professional fundraisers may charge. Specifically, the statute prohibited professional fundraisers from retaining "unrasonable" or "excessive" fees as defined by a three-tiered schedule.

The Court found that the charitable solicitations "involve a variety of speech interests . . . within the protection of the First Amendment." *Riley*, 108 S.Ct. at

2673. Citing its previous charitable solicitation first amendment decisions, the Court reiterated that "direct restriction on the amount of money a charity can spend is equivalent to a direct restriction on protected First Amendment activity." *Id.* at 2673. The Supreme Court then found that the requirement was content-based and therefore subject to "exacting first amendment scrutiny." *Id.*

Even considering the legislative history of the Cable Act, the Court here agrees with plaintiff. By requiring the franchisee to open certain channels for presumably unlimited use to the government and the general public, the City is directly regulating the programming, i.e., content of the franchisee cable system. Thus, upon reconsidering the question, the Court finds that it properly labeled the access requirements "non-incidental" burdens on speech in its previous order. In order to prevail on summary judgment, defendants must demonstrate to the Court that the requirement furthers a compelling interest precisely drawn to further that interest.

Compelling interest?

The City states as its interests in requiring public access channels: 1) to protect the first amendment interests of various parties by promoting the availability of diverse sources of information over a cable system; and 2) providing groups and individuals historically excluded from the electronic media with access to the medium of cable communications.

Defendants offer as evidence of the compelling nature of these interests, the legislative history behind the

Cable Act discussed above and the declarations of Joan Milke-Flores and Susan Herman.

Since 1988, Susan Herman has been the General Manager of the Department of Telecommunications of the City of Los Angeles. The Department of Telecommunications was created to franchise, regulate, and conduct long-range planning for telecommunications within the city. Supplemental Declaration, Herman, para. 2. Herman essentially reiterates the goals of the city in her declaration.

The declaration of Milke-Flores also restates the above goals, although in slightly more detail. Supp. Decl. of Milke-Flores, para. 26.

Plaintiff contends that defendants have merely asserted general interests without backing them up. Plaintiff also criticizes defendants' reliance on the congressional records in support of the constitutionality of the access requirement.

As to the latter point, it is true that the courts, not Congress, must ultimately pass on the constitutionality of the requirements. However, in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 105, 93 S.Ct. 2080, 2087, 36 L.Ed.2d 772 (1973), the Supreme Court, in assessing the constitutionality of the broadcast provision of the Federal Communications Act, recognized that while "deference" to Congress would be inappropriate, "[w]hen we face a complex problem with many hard questions and few easy answers, we do well to pay careful attention to how the other branches of government have addressed the same problem." *Id.* 93 S.Ct. at 2087.

With respect to plaintiff's challenges of the declarations, the Court finds that both Milke-Flores and Herman testify to their respective backgrounds and knowledge in the telecommunications field. Thus, their statements as to the concerns and telecommunications needs of the residents of South Central Los Angeles are not bald assertions, as plaintiff contends. Moreover, defendants offer exhibits to Herman's declaration that show that the City has been assessing the need for an access requirement for the past several years. Final Report to Telecommunications Task Force, pp. 13-17, 28.

Based on its consideration of the legislative history behind the Cable Act and the declaration testimony of Milke-Flores and Herman, the Court finds that the City has articulated compelling interests in having an access requirement.

Precisely drawn?

While defendants contend that the access requirement furthers its interest in promoting the availability of diverse sources, defendants do not explain with any specificity how or why the City decided to require the allocation of eight access channels instead of fewer. The regulations require that the prospective cable franchisee must carry at lest 52 channels. Thus, the franchisee is required to allot nearly one-sixth of its channel capacity to other speakers.

In plaintiff's motion, plaintiff provides a chart which purportedly shows the channels available to the operator for programming. However, the terms plaintiff uses in labeling the channels are not well-defined, and thus the chart is not useful to the present inquiry.

Defendants have not carried their burden of proof with respect to this factor; therefore, the Court denies defendants' motion for summary judgment as to the mandatory/leased access requirements, and grants plaintiff's motion as to these requirements. Accordingly, the Court finds said requirement unconstitutional.

Further, the Court finds that even if the more lenient incidental burden standard is applied, defendants have not shown that the access regulation is essential to carrying out the aforementioned interests; thus, summary judgment in plaintiff's favor would still result.

Character requirement

In the June 14 Order the Court found "[t]he city considers the overall character of a cable franchise bidder and its principals in deciding who should be awarded a cable franchise, and chooses the operator it deems "best" for each franchise service area." Finding of Fact No. 11. The Court found this requirement a non-incidental burden on speech. Conclusion of Law, No. 23.

However, in conjunction with the present summary judgment motions, defendants refer to evidence not previously considered by the Court. Thus, at this time, a review of this evidence, namely, Form C of the NOS ("Form C"), is appropriate. See Plaintiff's Exhibit J-C.

Form C first asks if the applicant has ever been convicted in certain criminal proceedings, including fraud, embezzlement, tax evasion, bribery, extortion, jury tampering, obstruction of justice and violation of FCC regulations. If the applicant responds affirmatively to any of these questions, the applicant is requested to attach a

statement providing details, such as the date of conviction and the name of the court having jurisdiction over the proceeding. The form then asks if the applicant or any principal has ever been held liable in a civil proceeding or is now a party to a proceeding involving unfair or anti-competitive business practices, violations of state or federal securities law, false/misleading advertising, or violation of FCC regulations and, if so, requests an explanation. If the answer is "yes," the applicant is again asked to furnish specifics.

Defendants claim this information is directly related to the City's substantial and compelling interest in assuring that the cable franchisee, which enjoys the privilege of conducting a profit-making business on the City's infrastructure, will deal honestly with the City and the public as a whole.

Plaintiff asserts, among other things, that the Court must consider other evidence besides the Form C questionnaire in deciding the constitutionality of the character requirement. Specifically, plaintiff points to defendants' admission that based on the City's evaluation of the cable franchise applications for a particular area, "the City selects the bidder who in its judgment demonstrates the best overall capability and willingness to provide a high quality cable communications service to the residents of the franchise service area." Response to plaintiff's Third Set of Interrogatories, Response No. 13. Indeed, the Court has incorporated this language into its June 14 Order. Finding of Fact No. 11.

First, the Court must determine whether in choosing the applicant with the "best overall capability" for a

particular franchise area, the City merely considers the past criminal or civil liability as defendants assert, or whether the City looks at the applicant's character in general.

To answer this question, the Court looks at the context in which the response to Interrogatory No. 13 was made.

Interrogatory No. 13 asks:

> Do you [the City] contend that the cable television Request for Proposals process identified in the Complaint is not a bidding process, such that whichever cable television system operator bids the highest (i.e., offers the City the most in case and in-kind donations) will "win" the "franchise" to be awarded through the Request for Proposals process? State the factual basis for your response.

Defendants' response states in relevant part:

> Franchises are awarded after thorough analysis and evaluation of franchise bid proposals on various factors, including financial resources, financial pro formas, system design, service and rates, community programming, facilities and equipment, employment practices, and performance in other jurisdictions. Based on these evaluations, the City selects the bidder who in its judgment demonstrates the best overall capability and willingness to provide a high quality cable communications services to the residents of the franchise service area.

Based on the first sentence of defendants' response, in which the City lists a wide variety of characteristics it

considers in selecting a cable franchisee, the Court concludes that the term "best overall capability" should be construed in the general sense, rather than in a manner limited to the applicant's criminal or civil liability background.

Standard of Review

Focussing on Form C of the NOS, defendants contend that the City requires applicants to complete it in order "to protect the public from irresponsible, dishonest, or deceptive business practices by the franchisee, and the cost and disruption resulting from an operator's breach of its franchise obligation . . . " Defendants' Character Motion, Memorandum of Points and Authorities, p. 9. Defendants contend once again that the requirement is "justified without reference to the content of the regulated speech," *Ward, supra,* 109 S.Ct. at 2757, and is therefore an incidental burden on speech.

Plaintiff, on the other hand, analogizes this case to *Riley, supra,* where the Supreme Court invalidated a "reasonable fee" statute governing the amount of fee a professional fundraiser may charge. However, in that case the Supreme Court also held that a state may constitutionally require a professional fundraiser to disclose certain financial information to the state as a means of protecting citizens from fraud. *Id.* 108 S.Ct. at 2676. Though the Supreme Court in *Riley* does not specifically describe the financial disclosure requirement to which it refers, it is clear that the relevant language in *Riley* is contra to plaintiff's argument.

Plaintiff also relies on *Minneapolis Star & tribune [sic] Co. v. Commissioner of Revenue,* 460 U.S. 575, 103 S.Ct.

1365, 75 L.Ed.2d 295 (1983). There, the Supreme Court held that the City of Minneapolis' imposition of a tax as a condition of engaging in protected activity was a form of prior restraint on speech. However, that case involved the print media. In its June 14 Order, this Court previously held the print media regulation standard of review was not applicable in a cable television regulation context. Conclusion of Law No. 9. Further, in *Minneapolis Star,* unlike here, the City admitted that its only interest in imposing the tax was to raise revenue. *Id.* 103 S.Ct. at 1372. Finally, the analogy plaintiff attempts to draw between the instant case and *Minneapolis Star* is undermined by the aforementioned dictum in *Riley, supra,* suggesting that financial inquiries are constitutional.

The most compelling argument in plaintiff's favor lies not with Supreme Court authority, but with the evidence itself. Question 9 of Form C: "Has the applicant or any principal ever initiated litigation against a franchising authority or has a franchising authority instigated litigation against it?" Clearly, this question poses a danger of speech infringement. While arguably this question might be pertinent to the determination of an applicant's honesty, it could also very easily be used as a means to discriminate against applicants who have been litigious or who have previously challenged franchising ordinances. Such discrimination is intolerable under the first amendment.

Defendants cite *Pacific West Cable Co. v. City of Sacramento California,* 798 F.2d 353, 355 (9th Cir. 1986), wherein the Ninth Circuit held

> [n]othing in or earlier decision in *Preferred Communications, Inc. v City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1984), aff'd, ___ U.S. ___, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986) requires that a municipality open its doors to all cable television comers, regardless of size, shape, quality, qualifications or threat to the ultimate capacity of the system.

Pacific West Cable at 355.

However, there is nothing in the above-cited language which precludes this Court from finding that the City's character regulations herein are non-incidental in nature.

Based on the fact that there exists, by the City's admission, an "overall" character requirement in the City's franchisee selection process and the fact that Form C inquires into the past litigation history of the applicant, creating a great potential for speech discrimination, the Court finds the character requirements non-incidental burdens on speech subject to the higher level of scrutiny.

Compelling interest?

Based on the language in the aforementioned authorities, in particular, *Riley, supra*, 109 S.Ct. at 2757 and *Pacific W. Cable, supra*, at 355, the Court finds that the City's interest in protecting the public from fraud and dishonesty is compelling. The Court further finds that the character requirement is not based on interests which require proof by empirical evidence. A City's interest in protecting its citizens from crime is always compelling.

Means precisely drawn?

Defendants assert that there is no dispute that Form C is narrowly-tailored to serve the interest in preventing fraud upon the public. However, the Court finds to the contrary. Question 9 of the questionnaire is not narrowly-tailored to serve the protection interest because it likely encompasses conduct having nothing to do with an applicant's fraud or dishonesty, i.e., legitimate challenges to franchise ordinances invoking first amendment rights.

Based on the foregoing, the Court finds that defendants have failed to meet their burden of proof on the constitutionality of the character requirements. Accordingly, the Court denies defendants' motion for summary judgment and grants plaintiff's motion as to this requirement and finds the requirement unconstitutional under the first amendment.

Further, even if the more lenient "substantial interest/essential means" test is applied, the Court finds that defendants have not succeeded in proving that all the questions on the questionnaire are essential to further the City's interest in protecting the public from fraud and dishonesty.

"State-of-the-art" requirement

The City requires that a cable franchise bidder operate and maintain a state-of-the-art cable television system which includes at least 52 channels of video services and interactive (two-way) service. Finding of Fact, No. 12.

The Court found this requirement an incidental burden on speech. Conclusion of Law, No. 25.

In its further motion for summary judgment, plaintiff challenges the Court's findings with respect to the standard of scrutiny to be applied in assessing the constitutionality of this requirement.

Defendants contend that it is undisputed that the City's interests underlying the state-of-the-art requirements are substantial and furthered by the requirement.

Proper standard

Plaintiff asserts that the Court made its ruling that the state-of-the-art requirements are "incidental" before learning what all of these interests are. Plaintiff further contends, now that the interests (discussed below) are clear to the Court, the Court must find they are non-incidental, since they cannot be "justified without reference to the content of the regulated speech." *Ward*, 109 S.Ct. at 2757.

The City asserts as its general interest in promulgating this regulations its seeking a "modern, efficient and cost-effective system of high quality, to deliver a variety of marketable services, and provide the flexibility needed to adjust to new developments." NOS, p. 8.

The requirement for the "state-of-the-art" facilities originated in the Cable Communications in Los Angeles Master Plan, prepared in 1976, sometimes called the Dordick Report ("the Dordick Report" or "the Report"). The Report concluded that Los Angeles will be organized in the future around "electronic highways" and that cable is integral to the City's long-range development in its commercial opportunities and benefits to citizens. Herman

Decl., Exh. 1, pp. 17 and 20. The requirement of a minimum of 52 channels with two-way capacity was recommended to the City as important for a variety of functions, including improving dialogues between the public and government officials, alleviating the City's transport difficulties by allowing electronic transfer of work, enhancing the educational system by accessing the homes of home-bound students, and improving emergency medical services.

The City summarizes its specific interests in promulgating the state-of-the-art requirement as the following: 1) maximizing the amount of cable services received by City residents; 2) ensuring that the cable system built in the South Central area has the capacity and flexibility to take advantage of future technological developments; 3) promoting universal availability of educational opportunities through use of the cable system technology; and 4) providing opportunities for universal public participation in civic events and governmental processes and 5) promoting the development of emerging cable technologies for such uses as home banking, shopping, billpaying and home security. Supp. Decl. Herman, para. 12.

At face value, these interests, in particular those related to the health and safety of the citizens of the South Central area seem substantial, if not compelling.

However, plaintiff asserts that the burden the state-of-the-art regulations place on speech are non-incidental because they are designed to promote certain types of speech and communication, such as educational speech. Plaintiff relies on the following language in *Riley, supra.*

> [A] statute regulating how a speaker may speak directly affects that speech . . . Here, the desired and intended effect of the statute is to encourage some form of solicitation and discourage others. *Riley, supra,* 108 S.Ct. at 2673, n. 5.

Plaintiff also relies on the opinion in *Midwest Video Corporation v. F.C.C.*, 571 F.2d 1025 (8th Cir. 1978), *aff'd* 440 U.S. 689 (1979), which, inter alia, invalidated F.C.C. requirements that cable companies have minimum channel capacity and capability to provide "two-way non-voice communications." *Id.* at 1034-35, 1053-57.

Specifically, plaintiff relies on the following language:

> In enforcing regulations designed by the regulation to make futuristic visions come true, the Courts must proceed with a care proportional to the risk of delivery thereby into regulator's hands an awesome power. For that way may lie not just a totally regulated future, unpalatable as that may be to a free people, but a government-designed, government-molded, government-packaged future. *Id.* at 1045.[3]

The Court agrees with plaintiff in its characterization of this requirement. When ruling on this issue previously, the Court did not have the benefit as it does now of the City's detailed description of its interests in having a

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[3] The Court cites *Midwest Video* only for this quote as it is particularly apropos to the state-of-the-art requirements being analyzed at present. The opinion rests on the adoption of the print-media standard in the cable television context. The Court has previously rejected the print-media standard as a means by which to analyze the constitutionality of a cable television regulation.

state-of-the-art requirement. Now that defendants have articulated the City's interests, it is apparent that some of these interests encourage certain types of speech over others. Thus, the requirement should be found a non-incidental burden on speech. Accordingly, the Court's previous finding that the requirement is an incidental burden on speech is hereby vacated.

Compelling interest

In its papers, the City merely states that the interests enumerated above which support its "state-of-the-art" requirement sprung from recommendations in the Dordick report. In other words, there is no evidence of an actual need for such requirements because the interest and justification for such interest offered by the City are the same.

For instance, the Dordick Report recommends a requirement of interactive capacity because "only through [such] capacity can video conferencing and similar services take place on a regular basis at reasonable cost to the user." Dordick Report, p. 35. However, the City provides no evidence as to whether there is, in fact, a need for such conferencing. Likewise, while it is true that enhanced emergency services are, at face value, always a good thing, the City provides no evidence as to why the medium of cable television should be required to participate in meeting this end. In other words, why should the cable operator be charged with protecting an interest not based on a demonstrated community need but, rather, the City's desire to have a particular type of cable franchise?

Clearly, the type of interests the City iterates in support of the state-of-the-art requirements should be subjected to a demonstration of need through empirical data because they are not in and of themselves compelling. Defendants' evidence lacks such data. Thus, the Court finds defendants have failed to show that the interests they have articulated in support of this requirement are compelling.

Precisely drawn

As there is a lack of evidence of need for a state-of-the-art requirement, the Court cannot determine whether the requirement is narrowly-tailored enough to pass constitutional muster.

The Court therefore finds that defendants have failed to meet their burden of establishing the constitutionality of the state-of-the-art requirement and that their motion must be denied and plaintiff's motion, as it pertains to this issue, granted. Thus, the Court finds the state-of-the-art requirement unconstitutional under the first amendment.

Moreover, even if the Court applies the less strict standard, the Court finds that the defendants have not met the burden of proving that the requirement is supported by a substantial interest which is essential to furthering that interest.

Sale/Duration of Service Requirement

"The City's franchising procedures allow the City to purchase the franchisee's property at below a fair market value, prohibit the franchisee from selling its Cable TV system without the City's consent, prohibit the franchisee

from withdrawing service without the City's consent and may compel the franchisee to continue its services after its franchise has been expired or revoked ['uninterrupted service requirement']." Order, Conclusion of Law No. 22.

In the present motions, defendants also mention the requirement that the cable franchise is for a set term of years. This and each of the aforementioned requirements relating to the sale or duration of a cable franchise shall be discussed in turn.

Option to purchase at fair value

The City claims its interest in reserving an option to purchase the franchisee's facilities stems from the fact that the City retains title to the public property occupied by the cable operator throughout the term of the franchise. As a custodian of this property, consisting of purported valuable public rights-of-way and private property easements, the City claims it has an underlying right to retain some degree of control over it. Supp. Decl., Milke-Flores, para. 15.

Specifically, Milke-Flores testifies that the City's costs will be excessive if the franchisee does not live up to its responsibilities. Milke-Flores further testifies that this problem is particularly acute in the case of cable TV franchisees which are given access to the City's "most vital property": The utility poles that carry the [DWP's] electrical facilities, as well as the telephone company's facilities. Milke-Flores states that it is critical to regulate the work that any cable company does on the utility poles in order to ensure that safety standards are met, and that safety hazards are not created.

First, in analyzing the above interest, the Court finds the City's option to buy requirement an incidental burden on speech, as it may be justified without reference to the content of the regulated speech.

Next, the Court turns to plaintiff's arguments. Plaintiff challenges this particular requirement with respect to the use of the words "fair value".

Ordinance No. 58,200 ("the Ordinance") Sec. 8 permits City purchase of any utility at any time after five years from the original issuance of the franchise. Sec. 8(2)(a). The ordinance describes the purchase price as "fair value". *Id.* The ordinance defined "fair value" as:

> . . . the reasonable value of the property of such utility having regard to its condition of repair and its adaptability and capacity for the use for which it shall have been originally been intended. The price to be paid by the City for any utility shall be on the basis of actual cost to the utility for the property taken, less depreciation accrued, as of the date of purchase . . . no allowance shall be made for franchise value, good will, going concern, earning power, [or] increased cost of reproduction . . .

Plaintiff correctly concludes that "fair value" as defined by the City does not really mean fair market value. Plaintiff argues that if the City's genuine interest is in ensuring that subscribers continue to receive uninterrupted service and to minimize disruption of the public domain, the City would be willing to pay an actual market price for such service.

Defendants' response is two-fold. First, defendants contend that a constitutional challenge at this stage is

premature – that if the purchase provision some day actually deprives a franchisee of just compensation, the remedy is to make a claim at the time. However, plaintiff is currently seeking a franchise and must, as the Ordinance currently stands, acquiesce to all of its terms and conditions in order to apply for a franchise. Plaintiff does not wish to "jump through this hoop" in order to be considered for a franchise; thus, it is appropriate to consider plaintiff's constitutional challenge at this time.

Secondly, defendants emphasize the fact that the City, in awarding a franchise, never relinquishes title to the infrastructure, i.e., all property occupied by the cable operator during the franchise term. Thus, the City concludes that the exclusion of the value of the franchise from the purchase price of the cable system prevents the City from compensating the operator for something that belongs to the City.

The Court finds defendants have not shown that the option to buy restriction is "not greater than is essential for the furtherance of that interest." *Quincy, supra,* at 1450, *quoting O'Brien,* 88 S.Ct. at 1679. In other words, defendants have failed to establish a sufficient nexus between the requirement and the interest which the requirement is purportedly protecting. Thus, the Court must deny defendants' motion for summary judgment as to the option-to-buy requirement, grant plaintiff's motion insofar as it applies to this requirement and find the requirement unconstitutional.

Uninterrupted service requirement

With respect to this requirement, defendants simply reiterate the importance of "uninterrupted service." Likewise, the declarations of Milke-Flores and Herman do nothing more than state that it is important that cable subscribers receive uninterrupted service. Thus, the connection between defendants' interest and the evidence supporting the need for a requirement to protect that interest is circular.

For this reason, the Court finds defendants have failed to meet their burden of proof with respect to this requirement. Accordingly, the Court denies defendants' summary judgment motion as to this requirement, grants plaintiff's motion as it relates to this requirement, and finds the requirement unconstitutional.

Prohibition of transfer of franchise without prior consent of the City

The City claims that it has a substantial interest in ensuring that a prospective transferee of a cable franchise will be able to perform at least as well as the incumbent operator.

Recognizing the general right of the City to regulate cable franchises so long as the regulations are consistent with the constitution, the Court finds the prior consent requirement constitutional as a matter of law.

Term of years requirement

The City issues a cable franchise for a set term of five years. Ordinance, Sec 8(a). The City claims it has a substantial interest in not encumbering public property to a private company in perpetuity stating that "to do so

would be a dereliction of the City's duties as trustee of the public property." Character Memorandum, p. 22.

Plaintiff contends that it is not the proper function of the government to select who can and cannot engage in free speech activity. Plaintiff further contends that such discretionary renewals raise an extensive danger of chilling of expression. This is because the cable operator, knowing that City officials will sit in judgment upon his or her continued right to speak may be forced to tailor its speech in order to remain in the City's favor.

Plaintiff supports its argument by pointing to the City's past practice with respect to the renewal procedure. In 1986, the City instituted a "request for renewal proposal" franchising procedure. In the proposal, the City seeks information about the character of the applicants, disclosure of programming intended to be offered and other information similar to that requested in the application for a franchise. For all the reasons plaintiff opposes the franchising ordinance, plaintiff asserts that the renewal procedure is improper.

The City responds that it is bound by the renewal provision of the Federal Cable Act 47 U.S.C. Sec. 547. Moreover, the City contends that the renewal aspects of the City's franchising scheme are not the subject of this litigation and, consequently, plaintiff can point to no evidence in the record to support this allegation.

However, a review of 47 U.S.C. Sec. 547 does not support defendants' argument. That section merely refers to a renewal procedure in general. It does not describe it, let alone contain a procedure paralleling the City's renewal proposal.

As to the City's argument that the renewal procedure is irrelevant to the present inquiry, the Court finds that the City "opened the door" to this issue by raising the term of years provision in its papers. Plaintiff's raising of the renewal procedure is therefore arguably relevant to the issue of whether the term of years provision chills speech and also goes to the question of the City's true interest in having such a provision.

The City does not provide the Court with actual evidence as to why the term of years provision is necessary. The City merely asserts that it does not want to keep public property tied up in perpetuity. The Court finds without evidence of need, the term of years provision, given the potential chilling effect, may be construed as too extreme a restriction.

Based on the foregoing, the Court finds this requirement incidental as it is not justified by suppressing speech. However, the Court denies defendants' summary judgment motion as to this requirement as defendants have failed to offer sufficient evidence to show a substantial interest in having such a requirement and, further, have failed to provide evidence of a sufficient connection between the requirement and the interest which it purportedly protects. Accordingly, plaintiff's summary judgment motion as to this requirement is granted and the Court finds the requirement unconstitutional.

Universal service requirement

In the previous order, the Court found the universal service requirement an incidental burden on speech and concluded that it is constitutional. Conclusion of Law No. 27.

Plaintiff, without formal motion, asks the Court to reconsider and to find not only that the requirement is a non-incidental burden, but also that it is unconstitutional.

Plaintiff raises no new relevant authorities law or facts to support its position. Thus, the Court denies plaintiff's motion as to this requirement and finds that the relevant ruling in the previous order still stands.

CONCLUSION

Based on the foregoing, applying the tests set forth in *O'Brien, supra,* and *Chicago Cable Communications, supra,* the Court finds the following with respect to the City's requirements being challenged:

One area/one operator

This requirement is an incidental burden on speech.

Though defendants have articulated substantial interests in having a one operator per area requirement, defendants have failed to establish that the requirement is essential to further these interests.

Accordingly, the Court denies defendants' motion and grants plaintiff's motion as each relates to this requirement and finds the requirement unconstitutional under the first amendment.

Community participation ("localism")

As in its previous order, the Court finds this criterion a non-incidental burden on speech.

Defendants have shown that this criterion is supported by compelling interests and that it is precisely drawn to further these interests.

Accordingly, the Court grants defendants' motion and denies plaintiff's motion as to this requirement.

Mandatory access/leased access

As in the previous order, the Court finds this requirement a non-incidental burden on speech.

Though defendants have shown compelling interests support this requirement, defendants have failed to show that the requirement is precisely drawn to further these interests.

Moreover, even if the more lenient standard for incidental burdens on speech is applied to the access requirements herein, the Court finds defendants have failed to show that the requirement is essential to furthering the interests which the requirement purportedly protects.

Accordingly, the Court denies defendants' motion for summary judgment and grants plaintiff's motion with respect to this requirement.

The requirement is unconstitutional.

Character requirement

This requirement imposes a non-incidental burden on speech.

Defendants have established that the interests underlying the requirement are compelling; however, defendants have failed to meet their burden of showing that

the requirement is precisely drawn to meet these interests.

Even applying the more lenient standard, defendants have failed to show that the requirement is essential to furthering the City's interest in protecting the public from fraud and dishonesty.

Accordingly, defendants' motion is denied and plaintiff's motion is granted with respect to this requirement.

The requirement is deemed unconstitutional.

State-of-the-art requirement

This requirement is non-incidental burden on speech.

Defendants have failed to show that this requirement is supported by compelling interests and thus cannot show that the requirement is precisely drawn to meet these compelling interests.

Accordingly, the Court denies defendants' motion and grants plaintiff's motion as each relates to this requirement and finds the requirement unconstitutional.

Finally, even if the Court applies the more lenient standard of review reserved for incidental burdens on speech, the Court concludes that defendants have failed to show substantial interests in support of this requirement.

Sale/duration of service

The Court finds all of the following requirements relating to the sale/duration of service of a cable franchise incidental burdens of speech, as in its previous order.

Option to buy

Defendants have articulated substantial interests in having such a requirement, but have failed to show that the requirement is essential to furthering these interests. Thus, as to this requirement, defendants' motion is denied and plaintiff's is granted and the Court finds the requirement unconstitutional.

Uninterrupted service

Defendants have failed to carry their burden of proof of showing that this requirement is essential to further a substantial interest. Accordingly, defendants' motion with respect to this requirement is denied, plaintiff's is granted and the requirement is deemed unconstitutional.

Prohibition of transfer

The Court finds this requirement constitutional as a matter of law.

Thus, defendants' motion as to this requirement is granted and plaintiff's motion is denied.

Term of years

Defendants have failed to sustain their burden of proof as to this requirement. Therefore, defendants' motion as it relates to this requirement is denied and plaintiff's motion is granted and the Court deems the requirement unconstitutional.

Universal service

The Court's previous ruling that this requirement is constitutional stands.

IT IS SO ORDERED.

Dated: 1/5/90

/s/ Consuelo B. Marshall
Consuelo B. Marshall, Judge
United States District Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PREFERRED COMMUNICATIONS, INC., Plaintiff, v. CITY OF LOS ANGELES and the DEPARTMENT OF WATER AND POWER, Defendants.	No. CV 83-5846 (CBM) (Bx) MEMORANDUM ORDER (Filed AUG 24 1990)

This matter came before the Court on defendants' motion and plaintiff's cross motion for summary judgment on Paragraphs 8(a)-8(h) of the January 30, 1990 Pretrial Conference Order (the *"PTC Order"*); and on defendants' motion for summary judgment on Paragraph 8(l) of the *PTC Order*.

BACKGROUND

For a review of the background of this case, *see* the Court's *Memorandum Order* of January 5, 1990 (The *"January 5 Order"*). Paragraph 8 of the *PTC Order* identified issues of law which, in plaintiff's view, remained to be litigated at trial, including:

> (a) The constitutional validity of defendant City's various financial demands, including a 5% franchise fee.
>
> (b) The constitutional validity of defendant City's demands for free goods and services.

(c) The constitutional validity of defendant City's demand that cable television companies form a Cable Franchise Advisory Board.

(d) The constitutional validity of defendant City's demand that cable television companies waive all right to recover damages resulting from cable television licenses or their enforcement.

(e) The constitutional validity of defendant City's demands that cable television companies provide (i) a detailed proposal on how they intend to operate their businesses, (ii) evidence of their "strong financial base," and (iii) evidence of their "sound business plans."

(f) The constitutional validity of defendant City's demand that cable television companies agree to permit it to control their customer relations.

(g) The constitutional validity of defendant City's demand that cable television companies agree to permit it to examine and inspect any of their business facilities and records without the need for any justification therefor.

(h) The constitutional validity of defendant City's demand that the right of cable television companies to speak and publish be subject to a contractual negotiating process, rather than a traditional licensing process applying general standards applicable to all applicants.

(l) The amount of out-of-pocket expenses due to plaintiff for expert witnesses to the extent those expenses are not recoverable as costs.

The Court granted defendants' request for leave to file summary judgment on Paragraphs 8(a)-8(h) and Paragraph 8(l) of the *PTC Order*.[1] In addition, the Court granted plaintiff's request for leave to file motions for summary judgment on Paragraphs 8(a)-8(h) of the *PTC Order*. Having considered both parties' moving papers, oppositions and evidence offered in support thereof, the Court hereby issues the following memorandum order:

DISCUSSION

Summary Judgment Standard

In *California Architectural Bldg. Products v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 689 (1988), the Ninth Circuit laid out the following Supreme Court guidelines for deciding a summary judgment motion:

> First, if the non-moving party will bear the burden of proof with respect to an element essential to its case, and that party fails to make a sufficient showing to establish a genuine dispute of fact with respect to the existence of the element, summary judgment is appropriate. *California*

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[1] Defendants had also requested leave to file motions for summary judgment on Paragraphs 8(m) (damages) and 8(n) (equitable relief) of the *PTC Order*. The Court denied the request to file a summary judgment motion on the issue of damages because it had already resolved that issue in its March 12, 1990 *Order on Defendants Motion in Limine to Exclude Testimony on Increased Cost of Construction and Economic Benefits*. Likewise, the Court denied the request to file for summary judgment on the question of equitable relief because, by definition, such relief is properly left to the Court.

Architectural at 1468, citing *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552-2553, 91 L.Ed. 265 (1986).

Second, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *California Architectural* at 1468, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 2424, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Finally, if the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *California Architectural* at 1468, citing *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).[2]

First Amendment Standard of Review

As discussed in the *January 5 Order*, when a regulatory scheme, such as the one challenged in the instant case, governs conduct which combines both speech and nonspeech elements, the Court must determine whether that regulation imposes an incidental or a non-incidental burden on the speech related activity. If the burden is incidental to speech related activity then, pursuant to the standard articulated in *U.S. v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed. 672, *reh'g denied*, 393 U.S. 900 (1968),

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[2] *January 5 Order* at 8-10.

the government can justify its regulatory activity if 1) it is within the constitutional powers of the government; 2) if it furthers an important or substantial interest; 3) if the government interest is unrelated to the suppression of free expression; and 4) if the incidental restriction is no greater than essential to further that interest.[3]

If, however, the regulation is related to "the suppression or protection of a particular set of ideas," it imposes a "non-incidental" burden on speech. Regulations imposing non-incidental burdens on speech "will be upheld, if at all, if the government adequately carries a significantly heavier burden of justification."[4] The *January 5 Order* adopted as a standard of review for non-incidental governmental regulations the language set forth in *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540, 1550 (7th Cir. 1989):

> There, the Court held that cable franchise requirements which may be characterized as 'content-related' 'may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest. The Court interprets the term 'precisely drawn' as describing a regulation which does not necessarily provide the least restrictive means of securing a compelling government interest, yet which is not afforded the same relative leeway given to incidental regulations. For instance, the rule in *U.S. v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86

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[3] *Id.* at 12.

[4] *January 5 Order* at 6, *quoting Quincy Cable T.V., Inc. v. F.C.C.*, 768 F.2d 1434, 1450 (D.C. Cir. 1985).

> L.Ed.2d 536 (1985), that an incidental regulation is allowed if absent the regulation the government's goal is less effectively achieved, should not apply in the non-incidental context.[5]

In First Amendment cases, the government always bears the burden of proving the constitutionality of the alleged speech-infringing ordinances. *N.A.A.C.P, Western Region v. City of Richmond*, 743 F.2d 1346, 1351 (9th Cir. 1984), citing *Rosen v. Port of Portland*, 641 F.2d 1243, 1246-47 (9th Cir. 1981); *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 317, 100 S.Ct. 1156, 1162, 63 L.Ed.2d 413 (1980).[6]

Thus, as to each of the remaining franchising requirements/criteria set forth in Paragraphs 8(a)-8(h), the defendants bear the burden of proof.

Plaintiff's Cross-Motions for Summary Judgment

Rather than file a notice of motion supported by a detailed memorandum of points and authorities relative to each of the issues raised by Paragraphs 8(a)-8(h) and Paragraph 8(l) of the *PTC Order*, plaintiff merely submitted a cross-motion "based on the files and pleadings in this case, together with such papers as will be filed by plaintiff in opposition to pending motions of defendants and such oral argument as may be had." Plaintiff contends that, because this is a First Amendment case, defendants bear the burden of proving the constitutionality of the alleged speech infringing requirements in Paragraphs

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[5] *January 5 Order* at 19 (citations omitted).

[6] *January 5 Order* at 8-10.

8(a)-8(h). *NAACP*, 743 F.2d at 1351. If defendants fail to meet that burden, plaintiff contends that summary judgment in its favor is appropriate.

Defendants argue that plaintiff's position rests on a "distorted misreading" of the First Amendment burden of proof set forth in *NAACP*, and of the summary judgment standard articulated in *Celotex*. Defendants' burden of proof on the First Amendment claims is not triggered until plaintiff first carries its burden that the provisions challenged do infringe speech. Additionally, defendants contend that *Celotex* did not sanction perfunctory summary judgment motions, such as plaintiff's, which fail even to set forth the basis for the claimed relief and point to no supporting material demonstrating the absence of a material fact.

Plaintiff has carried its burden of proof that First Amendment rights are implicated in the existing franchising scheme, and defendants now must show that its regulations are constitutional under *O'Brien*. Defendants have asserted elsewhere their belief that no genuine issues of material fact exist and only questions of law remain to be determined relative to Paragraphs 8(a)-8(h) and Paragraph 8(l) of the *PTC Order*. The Court has the inherent power to grant summary judgment against the moving party, *sua sponte*, where one party moves for summary judgment and, after the hearing, it appears from all the evidence presented that there is no genuine issue of material fact and the non-moving party is entitled to judgment as a matter of law. *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311 (9th Cir. 1982).

In deciding defendants' motions for summary judgment, the Court will concurrently rule on plaintiff's cross-motions.

I. Paragraph 8(a) (Franchise and Filing Fees)

Paragraph 8(a) focuses on the constitutional validity of the fee requirements specified in the 1982 Notice of Sale and Request for Proposals for a cable franchise for the South Central Area of Los Angeles (the "1982 NOS")[7]. Specifically, Paragraph 8(a) refers to the provisions that: i) franchise applicants pay a non-refundable "good faith deposit" of $500 and a $10,0000 non-refundable filing fee; ii) the applicant granted the franchise reimburse the City's expenses in processing the applications up to a maximum of $60,000; and iii) the franchisee pay a franchise fee equal to 5% of its gross annual revenues.

Defendants assert that the application, processing and franchise fee requirements are content-neutral and subsequently impose only incidental burdens on speech related activity. Because the arguments offered for the franchise fee scheme differ from those for the application and processing fees, this order will address them separately.

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[7] *See* Exhibits I, J, & K to Exhibits in Support of Plaintiff's Three Motions for Partial Summary Judgment (filed Sept. 14, 1988) ("Plaintiff's exh. I," "Plaintiff's exh. J" and "Plaintiff's exh. K").

A. The Franchise Fee Requirements

The City contends that the franchise fee requirements pose an incidental burden on speech related activity because their purpose is to compensate it for use of public property, an interest unrelated to speech. Franchise fees are charged not only on all cable television operators, but on all businesses franchised pursuant to the City Charter and Local Ordinance 58,200, the City's governing ordinance concerning franchises. As with other franchisees, cable operators benefit from the use of public property, streets, rights-of-way, and easements. The City argues that, like other property owners, it has a legitimate interest in receiving adequate compensation for use of its property by private users. As the trustee of public property on behalf of its residents, the City has a special duty to see that the public receives adequate compensation for use of public property by private commercial enterprises, such as cable operators, who make ongoing and comprehensive use of public property for private gain.

Both the U.S. Congress and the California legislature have recognized the nature of this interest by authorizing municipalities to impose a 5% franchise fee on cable franchisees.[8]

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[8] 47 U.S.C. §542(b) (franchising authority may charge a cable operator a franchise fee "not exceed[ing] 5 percent of such cable operator's gross revenues derived . . . from the operation of the cable system."); Cal. Govt. Code §53066(c) ("The maximum franchise fee for any [cable television] franchise or license hereafter awarded pursuant to . . . any ordinance . . . by any city . . . shall be 5 percent of the grantee's gross receipts from its operations within such city . . . ").

The Court agrees that the franchise provisions of Local Ordinance 58,200 and the City Charter are content-neutral and consequently impose only incidental burdens on speech related activity. It is necessary, therefore, to determine whether those regulations pass the *O'Brien* test.

1. Is the Franchise Fee within the Constitutional Powers of the Government?

The power of municipalities to impose a cable franchise fee of up to 5% has been explicitly authorized by the federal Cable Act and California statute.[9] As with other courts[10] who have analyzed the constitutionality of the 5% cable franchise fee requirement, this Court finds that the City's power to impose such a fee is within its constitutional power of government.

2. Does the Franchise Fee Requirement Further Substantial Governmental Interests?

The City states that "[t]he purpose of the franchise fee is to secure compensation for the comprehensive, ongoing use of public property that a cable system inherently entails." While plaintiff challenges whether the City even has a property interest, both the properties held in

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[9] 47 U.S.C. §542(b); Cal. Govt. Code §53066.

[10] *See, e.g., Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954, 973 (N.D. Cal 1987) (*"Group W I"*), *further proceedings*, 679 F. Supp. 977 (N.D. Cal 1988) (*"Group W II"*). *Erie Telecommunications, Inc. v. City of Erie* 659 F. Supp. 580, 598 (W.D.Pa. 1987).

fee by the City and those owned in fee by private owners with a permanent easement granted to the City constitute public property with public rights of way. Consequently, the City, as a trustee of public property on behalf of its residents, has a substantial interest in receiving compensation from private individuals who benefit from the commercial exploitation of that property.

Plaintiff unpersuasively argues that the existing franchise fees does [sic] not compensate the private commercial use of public property, but in fact "is just another name for a tax" because it raises revenues. Cable operators, like other private enterprises granted franchises in Los Angeles, benefit from the use of public property. It is unreasonable to assert that a commercial cable operation should be permitted to profit from public rights of way without compensating the public for the enjoyment those rights simply because their enterprise invokes certain First Amendment protections. Moreover, even if the City collects revenue from the franchise fees, a government interest in generating revenue is not unconstitutional.[11] Nor is a city's interest in raising revenue inconsistent with receiving compensation for the use of public property.

Consequently, the Court finds the franchise fee furthers substantial government interests.

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[11] *See, e.g., Erie* 659 F. Supp. at 597 ("[t]here is nothing unconstitutional about a city raising revenues through proper means").

3. Is the Franchise Fee Requirement Related to the Suppression of Expression?

The City asserts that its franchise fee regulations are completely unrelated to the suppression of expression, as all franchisees pay a fee irrespective of whether they involve speech related activities. In fact, Local Ordinance 58,200 was enacted in 1927, well before the advent of cable television. Plaintiff suggests that the historical background of the ordinance requiring the payment of franchise fees is irrelevant since, as the ordinance is presently applied, it discriminates against and among cable operators.

Preferred's argument is unconvincing. The ordinance, as it applies to cable franchises, is unrelated to the opinions of the cable operators or the content of their programs.[12] Nor does the disparity in rates charged

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[12] The Court notes that the City has deferred a significant portion of the 5% franchise fee for American Cablesystems, the existing cable franchise in the South Central Region. However, Defendants have attributed this deferral to the particular economic constraints of the South Central Region, which "represented only a marginally attractive area to cable operators from a profitability standpoint." Third Supplemental Declaration of Susan Herman, at ¶10. The City wished to provide South Central residents with cable as quickly as possible. Second Supplemental Declaration of Joan Milke-Flores at ¶17. Special amendments were made to the American Cablesystems franchise agreement whereby 80% of the 5% franchise fee could be deferred for the first five years of the franchise term, and then paid in years 6-15 of the franchise. *id.* at ¶16. This preferred treatment of American Cablesystems does not appear to be related to the speech-related activities of the franchise operators of the South Central region, however, but reflects a City policy

between cable operators and other City franchises reflect a City policy directed toward the suppression of speech. The rate imposed on a franchise reflects in part the scope and nature of the franchise operator public property usage. That the 5% rate charged cable operators (a rate, which as noted, *supra* has been authorized by the U.S. Congress and the California legislature) exceeds the rate imposed on other franchisees reflects the higher degree to which cable companies rely upon and benefit from commercial use of public property.

The franchise fee is unrelated to the suppression of expression and meets the third prong of *O'Brien*.

4. Would the City's Substantial Interests be Achieved Less Effectively Absent the Franchise Fee Requirement?

The City has maintained that it has an interest in receiving compensation for the private, commercial use of public property. The franchise fee is narrowly tailored to meet this interest. As the Court noted in its *January 5 Order*, incidental burdens "are not invalid just because there might be some less burdensome alternatives."[13]

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consideration to address the special needs an economically disadvantaged region. Moreover, the agreement with American Cablesystems only defers a portion of the 5% fee – by the expiration of the 15 year franchise, American Cablesystems will have paid the full 5%, along with all other Los Angeles cable franchisees.

[13] *January 5 Order* at 14.

The franchise fee scheme meets all the requirements set forth in *O'Brien* for content neutral speech. This Court is unwilling to enter the legislative realm to determine whether another rate level might be more favorable for cable systems. Cable operators might prefer to pay a lower franchise fee, or even no fee at all, but it is not the Court's role to set fees which reflect the preferences cable operators. The 5% franchise fee passes constitutional muster and defendants' motion for summary judgment on the franchise fee provisions is GRANTED. Plaintiff's cross-motion for summary judgment on the franchise fee provisions is DENIED.

B. The Filing Fee Requirements and Good Faith Deposit

The City contends that its requirements of a $10,000 filing fee, a $500 good faith deposit and the additional payment by the successful franchisee of $60,000 are merely incidental burdens on speech related activity. The $10,000 application fee, the City posits, reimburses it for the expenses incurred in the evaluation of proposals and granting of the franchise. The payment of up to an additional $60,000 by the selected applicant is intended to reimburse the City for its costs in processing the applications and awarding the franchise.

Preferred does not challenge the City's authority to impose some fee on franchise applicants to cover reasonable administrative and processing costs. Rather, plaintiff argues that the City's fee structure is premised on factors

which infringe upon speech related activities and therefore are unconstitutionally excessive. The Court agrees with plaintiff.

The Court's *January 5 Order* found a number of criteria by which the City evaluated franchise applications, including, but not limited to, the one operator per cable area requirement, the "overall character of the cable franchise bidder" and the "state-of-the art" requirement failed the *O'Brien* test. The dollar amount calculated by the City to reimburse it for its application and processing fees, therefore, was premised on factors which imposed both incidental burdens on speech that failed *O'Brien* and non-incidental burdens on speech related activity that did not meet the strict scrutiny standards. At the August 13, 1990 hearing on this motion, the City indicated that even if these unconstitutional provisions were removed, its application and processing fee structure would not be altered. Defendants have not provided the Court with evidence that the fees only reimburse them for review of Constitutional provisions.

Consequently, the application and processing fees as detailed in the 1982 NOS do not impose only incidental burdens on speech. Nor can the City justify a fee structure premised on unconstitutional factors under a higher standard of judicial scrutiny. Cable operators should not be compelled to reimburse the City for expenses generated by an unconstitutional application review process. The current fee reimbursement structure is not constitutional and defendants' motion for summary judgment on the application, processing and good faith deposit fees is

DENIED. Preferred's cross-motion for summary judgment on the application, processing and good faith deposit fees is GRANTED.

It is anticipated that the City will reevaluate and redraft its application process so that it passes constitutional review. At that point, the City should be able to calculate what fair and reasonable reimbursement is due for application and processing fees. The Court is not willing to usurp the authority of the City Counsel in determining what would reasonably compensate the City for the review and processing of applications. It merely holds that the City cannot charge applicants pursuant to a fee structure premised on unconstitutional considerations.

II. Paragraph 8(b) (Equipment and Service Requirements)

Paragraph 8(b) of the *PTC Order* identifies as a remaining issue "the constitutional validity of defendant City's demands for free goods and services." Defendants contend that Paragraph 8(b) refers to two provisions: "one that requires the franchisee to provide character generators and portable facilities" and "one that would permit the City, upon reasonable notice and request, to use the towers, poles and ducts of the franchisee's system." Plaintiff challenges those provisions, but it also challenges the requirement specified in the 1982 NOS that a cable operator provide production facilities, staff and operating support for the "access channel programming."

The requirements of i) the provision of technical equipment and services as specified in the 1982 NOS[14] and ii) free City access to cable facilities as provided for in franchise agreement between the City and the cable operator[15] shall be examined separately.

A. Equipment and Service Requirement

The 1982 NOS contains provisions which require the cable operator to provide equipment for the purpose of enabling the production of public, educational and government ("PEG") programming.[16] The City contends that these requirements are limited to two areas: the provision of character generators and the provision of portable production facilities, equipment which is relatively "low-tech" and which represents a minimal cost compared to the overall development of a cable operation. Plaintiff, however, notes that the 1982 NOS also includes a third requirement, namely, that the cable operator provide, "public access production facilities, equipment and staff available for noncommercial programming purposes."[17] Plaintiff asserts that public access production facilities comprise a considerable, even prohibitive expense for a cable operation.

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[14] Plaintiff's exh. H, §4, 6, Plaintiff's exh. I at 9.

[15] Plaintiff's exh. H at §6.2.

[16] Plaintiff's exh. H at §4.6(a)(5); Plaintiff's exh. I at 9.

[17] *Id.* Paragraph 16(i) of Plaintiff's Amended Complaint also addressed this production facilities requirement.

The Court has reviewed the *PTC Order*, and finds that the language of Paragraph 8(b) of the *PTC Order* is sufficiently broad to cover the requirements of public access production facilities, equipment and staff. Plaintiff's allegations pertaining to the requirements of public access production facilities are not new, but were spelled out in its Amended Complaint. Defendants have failed to address this requirement, and consequently have not met their burden of proving the constitutionality of this provision.[18] The requirement mandating the provision of "public access production facilities, equipment and staff available for noncommercial programming purposes" is unconstitutional. The Court shall now discuss the two remaining requirements defended by the City, namely, the character generators and the portable production facilities.

1. Character Generators and Portable Production Facilities

The City contends that the requirements of the 1982 NOS that a cable operator provide character generators and portable production facilities impose only incidental burdens on speech. The purpose of these two provisions is to enable the development of PEG programming, a requirement which impose non-incidental burdens on speech related activity.[19] However, the City maintains that the equipment provisions are content neutral, as all operators are required to provide generators and portable

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[18] *January 5 Order* at 8-10.

[19] *January 5 Order* at 27.

production facilities regardless of their viewpoints. Even if the burden imposed on cable operators activities to be incidental, defendants maintain that the equipment requirements are narrowly tailored to meet the compelling governmental interest of furthering the development of PEG programming.

The equipment requirements of Paragraph 8(b) impose only incidental burdens on First-Amendment activity. While PEG programming imposes non-incidental burdens on speech, provisions for character generators and portable production facilities are content neutral and an *O'Brien* analysis is appropriate.

Governmental Interest

Defendants assert that their equipment requirements further their interest in developing PEG programming. That interest, however, is unconstitutional.[20] It would be inconsistent to strike down a provision mandating the development of PEG programs on the one hand, yet to uphold the constitutionality of equipment provisions which would further the development of those unconstitutional programs. The City has provided no other justification for these minimum equipment requirements.[21] Consequently, the equipment requirements fail

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[20] *Id.* at 29.

[21] In fact, Susan Herman, General Manager of the Los Angeles Telecommunications Department states that "character generators and portable production facilities are thus designed to serve the same interests as the City's PEG access and community participation requirements." Third Supplemental Declaration of Susan Herman at ¶20.

the first prong of *O'Brien*. Defendants' motion for summary judgment on the issue of character generators and portable production facilities is DENIED. Plaintiff's cross-motion for summary judgment on the issue of character generators and portable production facilities is GRANTED.

B. Free City Access to Cable Facilities

Paragraph 8(b) of the *PTC Order* additionally refers to the requirement that cable operators provide to the City free use of their facilities. Specifically, the 1982 NOS states in pertinent part:

> The City shall have the right, free of charge, of installing, maintaining and operating upon antenna, towers and poles, or in underground ducts of the Grantee, antenna, amplifiers, coaxial cable, wire, fixtures and appurtenances necessary for a City communication system; such equipment to be installed, maintained and operated so as not to interfere with property or operations of the Grantee.[22]

The City contends that its access provision imposes an incidental burden on cable operators because it is entirely unrelated to the suppression of free expression. Its interest in access to the cable systems furthers a governmental interest which is not only substantial, but compelling. Among other things, the City's communication system must be available for emergency and disaster use, as well as for critical routine municipal functions such as

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[22] Plaintiff's exh. K at §6.2; Plaintiff's exh. H. at §6.2.

regulating traffic signals, transmitting alarms to fire stations, and providing communications for police, fire and security departments. The City argues it would be remiss in its primary duty of protecting the safety and welfare of its residents if it did not provide for such a communications system.

Plaintiff does not contest that City access to cable facilities for emergency communications furthers compelling governmental interests. Rather, it objects that the City seeks to further its governmental interest without compensating cable operators. Without compensation, "City use of PCI's property is a 'taking' in violation of the Fifth Amendment."

The City's requirement that cable operators make their facilities available to the City for purposes of transmitting City communications is an incidental burden on speech, as it is content neutral.

Under an *O'Brien* analysis, the City's interest in accessing cable systems for the purpose of transmitting City communications is within its constitutional powers. The ability of the City to transmit emergency communications is vital to the protection of its citizenry.

Second, piggybacking onto a cable operator's existing towers, poles, ducts and lines furthers the City's substantial interest. Likewise, City access to existing cable facilities is unrelated to the suppression of free expression. Finally, the incidental burden imposed by the City's limited use of a cable operator's towers, poles, ducts and lines is no greater than essential to further its interest.

The provision of the 1982 NOS requiring free City access to operator facilities is constitutional. Defendants' motion for summary judgment on the free access requirements as specified in Paragraph 8(b) of the *PTC Order* is GRANTED. Plaintiff's cross-motion for summary judgment on the free access requirements is DENIED.

III. Paragraph 8(c) (Cable Advisory Board)

Paragraph 8(c) of the *PTC Order* focuses on "[t]he constitutional validity of defendant City's demand that cable television companies form a Cable Franchise Advisory Board." The 1982 NOS included a provision which mandated:

> Grantee, when directed by the City, shall create a cable franchise advisory board. The structure, method of selecting membership, duties, responsibilities, operating procedures, term, and all other aspects of the advisory board shall be subject to approval of the City.[23]

Defendants contend that the advisory board requirements impose only an incidental burden on speech related activity that furthers a substantial interest of the City, which would be achieved less effectively absent the requirement. In the alternative, they assert that even if the advisory board imposes non-incidental burdens on speech, it is a precisely drawn means of serving compelling City interests.

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[23] Plaintiff's exh. K at § 4.10.

The purpose of the advisory board provision, the City asserts, was to ensure community input and participation in the operation of public access channels. The mandatory PEG requirements were found unconstitutional in its *January 5 Order.*[24] However, the Court upheld the City's community participation/localism requirements were upheld as a constitutionally permissible means of fostering local participation of the South Central community.[25]

In evaluating the constitutionality of the Cable Advisory Board, therefore, the Court must determine if the requirement constitutionally furthers the City's interest in fostering local community participation. Although defendants assert that the Cable Advisory Board imposes at most an incidental burden on speech, the Board, like the community participation/localism factor, directly affects the content of cable operator activity. As a non-incidental burden on speech, the Cable Advisory Board provisions must consequently meet the more stringent standard of review as set forth in *Chicago Cable Communications v. Chicago Cable Commission, supra,* and adopted by the Court in the *January 5 Order.*

Compelling State Interest?

The City maintains that the cable advisory board furthers the compelling state interest in allowing the voices of the local community, long denied a forum in which to speak, to be heard. The Court finds here, as it did with the community participation requirement in its

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[24] *January 5th Order* at 29.

[25] *Id.* at 24.

January 5 Order,[26] that a cable advisory board fosters the compelling interest of localism.

Precisely Drawn?

Defendants contend that the Cable Advisory Board, as defined in the 1982 NOS, is a precisely drawn means of furthering the compelling localism interests. However, a review of the language of that ordinance reveals that the means is hardly "precisely drawn." The City posits that it had envisioned the advisory board as a group of individuals whose purpose merely was to advise and to contribute community insights.

The City's draft ordinance is not precisely tailored to further that end, however. The language of the ordinance provides the City with virtually unfettered control over the powers and responsibilities of the advisory board. It is not at all apparent that, under the language of the 1982 NOS, the role of the Board would be strictly in an advisory capacity directed toward furthering localism. For example, there is absolutely nothing in the provision which would preclude the City from expressly giving to the Board the authority to investigate PCI's programming practices, to hold hearings on the content of PCI's expression, and even to assert authority to demand changes therein.

The powers and functions of the Advisory Board are so broadly defined that they cannot withstand the "precisely drawn" means test, and are subsequently an unconstitutional restriction on the speech activities of

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[26] *January 5 Order* at 23.

cable operators. Defendants' motion for summary judgment on Paragraph 8(c) of the *PTC Order* is DENIED. Plaintiff's cross-motion for summary judgment on Paragraph 8(c) of the *PTC Order* is GRANTED.

IV. Paragraph 8(d) (Recourse & Indemnity)

Paragraph 8(d) of the *PTC Order* identifies as a remaining issue "the constitutional validity of defendant City's demand that cable television companies waive all right to recover damages resulting from cable television licenses or their enforcement." Paragraph 8(d) specifically refers to the recourse and indemnity requirements set forth in the 1982 NOS. That provision states:

> The Grantee shall have no recourse whatsoever against the City for any loss, cost, expense or damage, arising out of any provision or requirement of this franchise or the enforcement thereof.[27]

The recourse and indemnity provisions, the City asserts, are standard provisions routinely included in government contracts for the purpose of protecting the City and its taxpayers from liability arising from the acts of other parties. Because they do not single out cable operators, the provisions do not rise even to the level of incidental burdens on First Amendment activity. However, even if the provisions pose an incidental burden on the speech activities of cable operators, they serve a narrowly tailored purpose to further a compelling government need.

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[27] Plaintiff's exh. K at § 3.1(d).

The recourse and indemnification provisions impose neither incidental nor non-incidental burdens on the First Amendment activities of cable operators. The provisions delineated in Paragraph 8(d) to [sic] pass First Amendment scrutiny.

The Court notes that defendants' wording of their recourse and indemnity provisions is overbroad. California state law discusses recourse provisions in the limited context of "the due and proper exercise of police power."[28] In contrast, the recourse provisions of the 1982 NOS prohibit recourse arising from *"any provision or requirement* of this franchise of the *enforcement thereof."* Plaintiff could be denied recourse for actions taken by the City which exceed its proper police authority. Similarly, language in the City's indemnification provisions,[29] which states that a grantee shall indemnify the City against *all* claims and against *all* liability arising out of the enjoyment of a franchise overlooks liability arising from negligent conduct by City personnel or third party actions.

The Court would advise Defendants to conform their recourse provisions to California's statutory language and to more narrowly word their indemnification provisions. However, because the Court does not find that the recourse and indemnification provisions impose burdens on speech related activity, they are not unconstitutional merely because they could be more narrowly tailored. Defendants' motion for summary judgment on the waiver

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[28] Cal. Gov't Code § 53066.1(p).

[29] Plaintiff's exh. K at § 6.5.

of damages issue is GRANTED, and plaintiff's cross-motion re waiver of damages is DENIED.

V. Paragraph 8(e) (Financial and Technical Qualifications)

Paragraph 8(e) of the *PTC Order* identifies as a remaining issue:

> The constitutional validity of defendant City's demands that cable television companies provide (i) a detailed proposal on how they intend to operate their businesses, (ii) evidence of their "strong financial base," and (iii) evidence of their "sound business plans."

Paragraph 8(e) specifically refers to the City's requirement that a cable franchise applicant provide information concerning whether the applicant has the financial resources and technical experience to construct and operate a cable system in South Central. The City argues that such a disclosure requirement imposes only an incidental burden on speech because it evinces governmental interests completely unrelated to the suppression or protection of a particular set of ideas.

Plaintiff suggests that the financial and technical disclosure questionnaire imposes a non-incidental burden on prospective cable franchisees by declaring that "[e]xamination of the City's 1982 NOS demonstrates that the City demanded the right to make subjective assessments as to 'soundness' and 'strength,' and forced cable operators to reveal all information about their intended operations, down to the smallest detail." Sound business

plans and a strong financial base, while arguably subjective terms, are interests unrelated to the suppression or protection of a particular set of ideas. Moreover, the terms "soundness" and "strength" lifted from the descriptive portion of the 1982 NOS become markedly more objective when placed in the context of the detailed financial and technical questionnaires provided by the City to prospective cable franchisees. The burdens imposed by the financial resources and technical qualifications questionnaires are incidental, and the *O'Brien* standard applies.

The City states that, as a trustee of public property, it has an interest in requiring detailed financial and technical data to assure that a prospective cable franchisee can and will: (1) construct and operate its system safely and in a technically competent manner; (2) provide universal service by completing the construction and operation of its system throughout the franchise are [sic]; and (3) perform its other franchise obligations.

A municipality's interest in ensuring the safe operation of a cable franchise is substantial and within its constitutional powers. The record establishes that a cable system relies upon the installation of hundreds of miles of cable through public property.[30] It would be a breach of the public trust if the City failed to take preliminary steps to ensure that such installation and operation was conducted safely.

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[30] *See, e.g.*, Third Supplemental Declaration of Susan Herman at 14, ¶ 30 (Nearly 700 cable plant miles in the South Central region alone).

Without screening those applicants who lack the finances necessary to construct a viable cable station, the City could find itself saddled with the expensive task of seeking new operators to complete partially installed systems. In addition, by risking the possibility that a potential cable operator lacks the finances to service the entire South Central region, the City's compelling interest in universal service would be thwarted. Such legitimate concerns of the City are unrelated to the suppression of free expression.

The final prong of the *O'Brien* test is whether the requirements to provide financial and technical data is no greater than essential to further the City's substantial interest. Plaintiff protests in one breath that the financial and technical data questionnaires are both unconstitutionally vague and overly intrusive. Rather than supply such detailed information, the City should choose a less restrictive alternative. For example, prospective franchisees could be required to post a bond to ensure financial viability. Likewise a franchisee could consent to safety inspections of its operation.

That alternative methods may exist to achieve the City's substantial interests begs the clear standards set by *O'Brien* – the City mut show that its current regulation is no greater than essential to further its substantial interest. The "least restrictive means" test is inapplicable to the instant motion.[31] Because the burden imposed is incidental, the City's requirements do not even need to [sic] narrowly tailored, as they are here, to further its interest

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[31] *See January 5 Order* at 14.

in ensuring the safe and financially responsible use of public rights of way. The provisions are constitutional, and defendants' motion for summary judgment on Paragraph 8(e) of the *PTC Order* is GRANTED. Plaintiff's cross-motion for summary judgment on Paragraph 8(e) is DENIED.

VI. Paragraph 8(f) (Customer Service)

Paragraph 8(f) of the *PTC Order* raises as an issue:

> (f) The constitutional validity of defendant City's demand that cable television companies agree to permit it to control their customer relations.

Paragraph 8(f) refers to the 1982 NOS requirement that a franchisee i) maintain a high standard of courtesy in customer relations at all times; ii) maintain a log of all headend, trunk, or distribution line service failures; iii) maintain a local business office with a toll-free number; iv) maintain a record of all subscriber complaints; and v) notify all subscribers periodically that any complaints not satisfactorily handled be referred to the appropriate City department.[32] Defendants characterize these customer service requirements provisions as "recordkeeping and disclosure requirements" which, at most, place only an incidental burden on speech. That customer service standards are not related to the content of a cable operator's programming is underscored by the existence of similar

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[32] Plaintiff's exh. K at § 4.7.

(and in some cases, even more stringent) requirements on other franchised users of public rights-of-way.[33]

Plaintiff does not challenge the constitutionality of the customer service provisions of the 1982 NOS so much as "the expansive and discretionary manner in which the City has interpreted these provisions in its regulation of cable operators throughout the City." Plaintiff cites regulations passed by the City subsequent to the 1982 NOS which clarify some service requirements, and contends that, at various later dates, defendants considering imposing additional, more onerous customer service regulations on cable operators. These challenges, however, are irrelevant as to the specifications of Paragraph 8(f).

The *Order Re Pretrial Conference Order,* holds that this case involves plaintiff's facial attack on the City's franchising process as embodied in the 1982 NOS, not an attack on that process "as applied" to it, or "as applied" to other cable applicants or operators.[34] Plaintiff has failed to explain how the requirements, as detailed in the 1982 NOS, constitute a non-incidental burden on speech. Nor does plaintiff argue that the requirements fail the *O'Brien* standards for incidental burdens on speech. Summary judgment on Paragraph 8(f) is GRANTED in favor of defendants. Plaintiff's cross-motion for summary judgment on Paragraph 8(f) is DENIED.

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[33] Defendants' exh. 50 at Rules 801-806 (financial penalties imposed upon taxicab operators that fail to answer their telephones and/or pick up passengers within a specific time period).

[34] *Order re Pretrial Conference Order* at 4 (filed March 6, 1990).

VII. Paragraph 8(g) of the PTC Order

Paragraph 8(g) of the *PTC Order* challenges:

> The constitutional validity of defendant City's demand that cable television companies agree to permit it to examine and inspect any of their business facilities and records without the need for any justification therefor.

Paragraph 8(g) refers to a provision in the 1982 NOS which states:

> At all reasonable times, the Grantee shall permit any duly authorized representative of the Board to examine all franchise property, together with any appurtenant property, of the Grantee situated within or without the City, and to examine and transcribe any and all maps and other records kept or maintained by the Grantee or under its control which affect the operations, affairs, transactions or property of the Grantee with respect thereto. If any of such maps or records are not kept in the City, or upon reasonable request made available in the City, and if the Board shall determine that an examination thereof is necessary or appropriate to the performance of any of its duties, then all travel and maintenance expense necessarily incurred in making such examination shall be paid by the Grantee.
>
> The Grantee shall prepare and furnish to the Board, at the time and in the form prescribed by the Board, such reports, with respect to its operations, affairs, transactions or property, as may be reasonable necessary or appropriate to the

> performance of any of the duties of the Board in connection with this franchise.[35]

Defendants contend the provision refers solely to the inspection of a cable franchisee's property and records, an activity entirely unrelated to a cable operator's speech activities. Consequently, they argue, the *O'Brien* standards are inapplicable.

City inspection of property and records is an activity which is indifferent to the content of a cable operator's speech. consequently, neither *O'Brien* nor strict scrutiny analyses are necessary. The inspection provisions do not impose First Amendment restrictions upon cable operators. Summary judgment on defendants' motion on Paragraph 8(g) is GRANTED. Plaintiff's cross-motion for summary judgment on Paragraph 8(g) is DENIED.

VIII. Paragraph 8(h) (Notice of Sale Process)

Paragraph 8(h) of the *PTC Order* identifies as a remaining issue:

> The constitutional validity of defendant City's demand that the right of cable television companies to speak and publish be subject to a contractual negotiating process, rather than a traditional licensing process applying general standards applicable to all applicants.

Defendants argue that plaintiff's demand for a licensing scheme, rather than the existing franchise process, involves a meritless semantic debate. Certain distinctions

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[35] Plaintiff's exh. K at § 6.6.

do exist between franchise and license schemes, however. A franchise is a right or privilege of public interest that is essential to the performance of the general function of the franchisee, granted by a government duly empowered to grant it. In contrast, a license is a right or privilege not essential to the general function or purpose of the grantee, such as a temporary or revocable permit to occupy or use a portion of some public street. The grant of privileges to a cable operator is more properly viewed as an activity subject to franchise rather than license or permit.

Because a license confers only a temporary privilege, rather than the long-term assurances of a franchise, plaintiff's demand for a licensing scheme provides it with no particular advantage. No matter which scheme is employed, plaintiff would not be spared the substantive requirements in the 1982 NOS. Finally, plaintiff's assertion that the present franchising process does not apply "general standards applicable to all applicants" misstates the specifications of Local Ordinance 58,200 and California Government Code §§53066 *et seq.*, as well as the 1982 NOS, which set forth standards generally applicable to all franchise applicants.

Paragraph 8(h) is limited to questions of procedure, rather than substance: is a franchise process, rather than a licensing scheme, as it applies to cable operators, within the City's constitutional powers? The Court believes the answer to that is in the affirmative.

Federal, state and local law authorize the City to grant franchises to private users of public ways in general, and to cable operators in particular.[36] The rational [sic] behind such authority is that a municipality, as trustee of public property, has a compelling duty to ensure that public rights of way are utilized in a safe and responsible manner. A franchise scheme, rather than a licensing process, grants the private business the long-term opportunity to profit from the exploitation of public property. Moreover, a licensing scheme such as the type anticipated by plaintiff would not obviate the need for the City to set clear standards governing the use of public rights of way.

The City's power to grant franchises to cable operators is constitutionally permissible under *O'Brien*. While specific provisions within the 1982 NOS impose incidental burdens on First Amendment activity, the power to franchise *per se* imposes only non-incidental burdens on speech. Franchises further the City's substantial, even compelling, interest in safeguarding the public interest. Because the City requires the grant of a franchise to *all* commercial users of public rights of way, Local Ordinance 58,200 does not suppress or protect a particular First Amendment speaker. Absent a franchise scheme, the City could not maintain the degree of supervision necessary to further its compelling interests.

Plaintiff contends that the Ninth Circuit has mandated the dissolution of the City's power to grant franchises

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[36] 47 U.S.C. §§ 521 *et seq.*; Cal. Gov't Code §§53066, 53066.1(p); Los Angeles Administrative Code Defendants' exh. 49 at Article 2 § 13.62; Ordinance No. 58,200.

to cable operators. The Supreme Court, in affirming the Ninth Circuit's holding that Preferred's complaint should not have been dismissed, specifically did so on narrower grounds. While the Supreme Court agreed with the Court of Appeals that the activities in which Preferred allegedly sought to engage plainly implicated the First Amendment, it further stated:

> We do not think, however, that it is desirable to express any more detailed views on the proper resolution of the First Amendment question raised by the respondent's complaint and the City's responses to it without a fuller development of the disputed issues in the case.

106 S.Ct. at 2037-2038.

All plaintiff's substantive challenges to the 1982 NOS have been addressed in this order and in the Court's previous orders. Those specific provisions which were violative of the First Amendment standards articulated by *O'Brien* subsequently have been struck down. It is now the task of the City to redraft a franchising statute which conforms with the constitutional guidelines articulated by this Court. While specific provisions of the 1982 NOS can no longer be employed, the City is not precluded from utilizing a franchise scheme, as opposed to a licensing process in an effort to protect the public interest.

Moreover, plaintiff's assertion that the Ninth Circuit has effectively estopped the City from employing such a scheme overlooks the very language which it cited in support of its arguments. The Ninth Circuit, while holding that a scheme which discriminated among cable operators violated the First Amendment, nevertheless found

that the City had the power to "franchise" rather than "license" cable users of public rights of way.

Consequently, defendants' motion for summary judgment on Paragraph 8(h) of the *PTC Order* is GRANTED. Plaintiff's cross-motion for summary judgment on Paragraph 8(h) of the *PTC Order* is DENIED.

IX. Paragraph 8(l) (Expert Witness Fees)

Paragraph 8(l) of the *PTC Order* raises as a remaining legal issue to be determined:

> The amount of out-of-pocket expenses due to plaintiff for expert witnesses to the extent those expenses are not recoverable as costs.

The *Order Re Remaining Issues to Be Resolved on Summary Judgment* stated this issue as "whether expert witness fees are properly part of costs recoverable under 42 U.S.C. §1988, or whether they should be award [sic] as part of a separate damages claim."[37] Whether expert witness fees are properly part of costs recoverable under 42 U.S.C. §1988 – is now before the Supreme Court in the case of *West Virginia University Hospitals, Inc. v. Casey*.[38] This Court therefore withholds its decision pending a ruling by the Supreme Court.

It is appropriate, however, to address whether plaintiff can recover expert witness fees as a special damages

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[37] *Order Re Remaining Issues To Be Resolved on Summary Judgment* at 3, ¶ 9 (filed June 8, 1990).

[38] 885 F.2d 11 (3d Cir. 1989), *cert. granted*, ___ U.S. ___, 110 S.Ct. 1294, 108 L.Ed.2d 472 (1990).

claim in the event that those fees are not properly recoverable under §1988. Defendants contend that plaintiff's claim for special damages is precluded by longstanding "American Rule," under which litigation expenses expert witness fees in excess of statutory witness fees are generally borne by the litigant that incurs them.

Plaintiff cites neither statute nor precedent in support of its claim for an award of "special damages" to cover its expert witness fee expenditures. Instead, Preferred merely argues that it would be equitable for the Court to leave a plaintiff "no worse off" for having obtained declaratory relief as to violations of its constitutional rights.

Absent a statute creating a category of special damages for expert witness fees, the Court cannot authorize such an award. While plaintiff protests that the burden of shouldering its own expert witness fees is inequitable, plaintiff chose its own litigation strategy. Its decision to expend funds on expert witness fees, absent clear language providing for the reimbursement of those fees, was one freely made. That plaintiff should have to pay for those fees (in the event the Supreme Court decides that such expenditures are not properly recoverable under §1988) is hardly inequitable. Defendants' motion for summary judgment on this second issue raised by paragraph 8(l) is GRANTED. Plaintiff's cross-motion for summary judgment on its claim for special damages in the absence of explicit statutory authority is DENIED.

Status Conference

The parties are hereby ordered to attend a status conference on September 19, 1990 at 2:30 p.m.

IT IS SO ORDERED.

Date: 8/24/90

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL,
JUDGE
UNITED STATES
DISTRICT COURT

AMENDMENT I to UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

CALIFORNIA CONSTITUTION, ARTICLE I, SECTION 2

§ 2. Liberty of speech or of the press; responsibility for abuse; right to refuse to disclose source of information by member of news media

Sec. 2. (a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

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47 U.S.C. § 224

Chapter 5 – Wire or Radio Communication

Subchapter II – Common Carriers

§ 224. Pole attachments

(a) Definitions

As used in this section:

(1) The term "utility" means any person whose rates or charges are regulated by the

Federal Government or a State and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including

issuing cease and desist orders, as authorized by section 312(b) of this title.

(2) Within 180 days from February 21, 1978, the Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that –

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of cable television services, as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments –

(A) unless the State has issued and made effective rules and regulation implementing the

State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter –

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

(d) Determination of just and reasonable rates; "usable space" defined

(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(June 19, 1934, c. 652, Title II, § 224, as added Feb. 21, 1978, Pub.L. 95-234, § 6, 92 Stat. 35 and amended Sept. 13,

1982, Pub. L. 97-259, Title I, § 106, 96 Stat. 1091; Oct. 30, 1984, Pub.L. 98-549, § 4, 98 Stat. 2801.)

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47 U.S.C. § 521, et seq.

Chapter 5-A: Cable Communications

§ 521. Purposes

The purposes of this subchapter are to –

(1) establish a national policy concerning cable communications;

(2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;

(3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;

(4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;

(5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter; and

(6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

§ 522. Definitions

For the purposes of this subchapter –

. . .

(9) the term "franchise" means an initial authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to section 546 of this title), issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system

. . .

§ 541. General franchise requirements

(a) Authority to award franchises; public rights-of-way and easements; equal access to service; time for provision of service; assurances

(1) A franchising authority may award, in accordance with the provision of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision

pursuant to the provisions of section 555 of this title for failure to comply with this subsection.

(2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is [sic] within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure –

(A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

(C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

(3) In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

(4) In awarding a franchise, the franchising authority –

(A) shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;

(B) may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; and

(C) may require adequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service.

(b) No cable service without franchise; exception under prior law

(1) Except to the extent provided in paragraph (2) and subsection (f) of this section, a cable operator may not provide cable service without a franchise.

(2) Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires.

(c) Status of cable system as common carrier or utility

Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

. . .

California Public Utilities Code § 762

§ 762. Order for addition, repair, or change in physical property; site of new structure; order requiring joint action; division of cost

Whenever the commission, after a hearing, finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements, or changes be made or such structures be erected in the manner and within the time specified in the order. If the commission orders the erection of a new structure, it may also fix the site thereof. If the order requires joint action by two or more public utilities, the commission shall so notify them and shall fix a reasonable time within which they may agree upon the portion or division of the cost which each shall bear. If at the expiration of such time the public utilities fail to file with the commission a statement that an agreement has been made for a division or apportionment of the cost, the commission may, after further hearing, make an order fixing the proportion of such cost to be borne by each public utility and the manner in which payment shall be made or secured.

(Stats.1951, c. 764, p. 2052, § 762.)

California Public Utilities Code § 762.5

§ 762.5 Location of structures; factors

The commission, as a basis for making any order pursuant to the provisions of Section 762 relating to location of structures, shall give consideration to, and include in its order findings upon, the following factors:

(a) Community values.

(b) Recreational and park areas.

(c) Historical and aesthetic values.

(d) Influence on environment, except that in the case of any structure located in another state which will be subject to environmental impact review pursuant to the National Environmental Policy Act of 1969 (Chapter 55 (commencing with Section 4321) of Title 42 of the United States Code) or similar state laws in the other state, the commission shall not consider influence on the environment unless any emissions or discharges therefrom would have a significant influence on the environment of this state.

(Amended by Stats.1981, c. 573, p. 2243, § 1.)

California Public Utilities Code § 767

§ 767. Order for use of one public utility's facilities by another; compensation

Whenever the commission, after a hearing had upon its own motion or upon complaint of a public utility affected, finds that public convenience and necessity require the use by one public utility of all or any part of the conduits, subways, tracks, wires, poles, pipes, or other equipment, on, over, or under any street or highway, and belonging to another public utility, and that such use will not result in irreparable injury to the owner or other users of such property or equipment or in any substantial detriment to the service, and that such public utilities have failed to agree upon such use or the terms and conditions or compensation therefor, the commission may by order direct that such use be permitted, and prescribe a reasonable compensation and reasonable terms and conditions for the joint use. If such use is directed, the public utility to whom the use is permitted shall be liable to the owner or other users for such damage as may result therefrom to the property of the owner or other users thereof, and the commission may ascertain and direct the payment, prior to such use, of fair and just compensation for damage suffered, if any.

(Stats.1951, c. 764, p. 2054, § 767.)

California Public Utilities Code § 767.5

§ 767.5. Pole attachments and rearrangements; rates, terms and conditions

(a) As used in this section:

(1) "Public utility" includes any person, firm, or corporation, except a publicly owned public utility, which owns or controls, or in combination jointly owns or controls, support structures or rights-of-way used or useful, in whole or in part, for wire communication.

(2) "Support structure" includes, but is not limited to, a utility pole, anchor, duct, conduit, manhole, or handhole.

(3) "Pole attachment" means any attachment to surplus space, or use of excess capacity, by a cable television corporation for a wire communication system on or in any support structure located on or in any right-of-way or easement owned, controlled, or used by a public utility.

(4) "Surplus space" means that portion of the usable space on a utility pole which has the necessary clearance from other pole users, as required by the orders and regulations of the commission, to allow its use by a cable television corporation for a pole attachment.

(5) "Excess capacity" means volume or capacity in a duct, conduit, or support structure other than a utility pole or anchor which can be used, pursuant to the orders and regulations of the commission, for a pole attachment.

(6) "Useable space" means the total distance between the top of the utility pole and the lowest possible

attachment point that provides the minimum allowable vertical clearance.

(7) "Minimum allowable vertical clearance" means the minimum clearance for communication conductors along rights-of-way or other areas as specified in the orders and regulations of the commission.

(8) "Rearrangements" means work performed, at the request of a cable television corporation, to, on, or in an existing support structure to create such surplus space or excess capacity as is necessary to make it usable for a pole attachment. When an existing support structure does not contain adequate surplus space or excess capacity and cannot be so rearranged as to create the required surplus space or excess capacity for a pole attachment, "rearrangements" shall include replacement, at the request of a cable television corporation, of the support structure in order to provide adequate surplus space or excess capacity.

(9) "Annual cost of ownership" means the sum of the annual capital costs and annual operation costs of the support structure which shall be the average costs of all similar support structures owned by the public utility. The basis for computation of annual capital costs shall be historical capital costs less depreciation. The accounts upon which the historical capital costs are determined shall include a credit for all reimbursed capital costs of the public utility. Depreciation shall be based upon the average service life of the support structure. As used in this paragraph, "annual cost of ownership" shall not include costs for any property not necessary for a pole attachment.

(b) The Legislature finds and declares that public utilities have dedicated a portion of such support structures to cable television corporations for pole attachments in that public utilities have made available, through a course of conduct covering many years, surplus space and excess capacity on and in their support structures for use by cable television corporations for pole attachments, and that the provision by such public utilities of surplus space and excess capacity for such pole attachments is a public utility service delivered by public utilities to cable television corporations.

The Legislature further finds and declares that it is in the interests of the people of California for public utilities to continue to make available such surplus space and excess capacity for use by cable television corporations.

(c) Whenever a public utility and a cable television corporation or association of cable television corporations are unable to agree upon the terms, conditions, or annual compensation for pole attachments or the terms, conditions, or costs of rearrangements, the commission shall establish and enforce the rates, terms, and conditions for pole attachments and rearrangements so as to assure a public utility the recovery of both of the following:

(1) A one-time reimbursement for actual costs incurred by the public utility for rearrangements performed at the request of the cable television corporation.

(2) An annual recurring fee computed as follows:

(A) For each pole and supporting anchor actually used by the cable television corporation, for a period of four years following the effective date of this section, the

annual fee shall be two dollars and fifty cents ($2.50). Thereafter, the annual fee shall be two dollars and fifty cents ($2.50) or 7.4 percent of the public utility's annual cost of ownership for the pole and supporting anchor, whichever is greater, except that if a public utility applies for establishment of a fee in excess of two dollars and fifty cents ($2.50) under this section, the annual fee shall be 7.4 percent of the public utility's annual cost of ownership for the pole and supporting anchor.

(B) For support structures used by the cable television corporation, other than poles or anchors, a percentage of the annual cost of ownership for the support structure, computed by dividing the volume or capacity rendered unusable by the cable television corporation's equipment by the total usable volume or capacity. As used in this paragraph, "total usable volume or capacity" means all volume or capacity in which the public utility's line, plant, or system could legally be located, including the volume or capacity rendered unusable by the cable television corporation's equipment.

(d) In the event that it becomes necessary for the public utility to use space or capacity on or in a support structure occupied by the cable television corporation's equipment, the cable television corporation shall either (1) pay all costs for rearrangements necessary to maintain the pole attachment or (2) remove its cable television equipment at its own expense.

(Added by Stats.1980, c. 646, p. 1811, § 2, eff. July 20, 1980; Stats.1980, c. 652, p. 1827, § 2, eff. July 20, 1980.)

California Public Utilities Code § 7901

§ 7901. Construction of lines. Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters. (Stats.1951, c. 764, p. 2194, § 7901.)

City of Los Angeles Administrative Code

DIVISION 13
FRANCHISES, PERMITS AND PRIVILEGES

CHAPTER 1

PROCEDURES FOR THE GRANTING OF FRANCHISES, PERMITS AND PRIVILEGES

ARTICLE 1
POWERS OF CITY

Sec. 13.1. Respecting Public Utilities.

The City of Los Angeles, in addition to any other rights and powers now held by it, or that hereafter may be granted to it under the constitution or laws of the State, shall have the right and power, subject to the restrictions contained in the Charter:

a. To grant franchises for the operation of public utilities.

b. To regulate the operation of and to fix the rates of privately owned public utilities and public services and to compel from time to time reasonable extensions of the facilities for service of any such utility or service, all in a manner not in conflict with any paramount regulation, rate fixing or extension requirements for any such utility or service by the State or nation.

c. To acquire, construct, maintain, operate or sell public utilities within or without the City or State, either by the City itself or in conjunction with other cities or governmental bodies, and to make contracts in connection therewith.

* * *

ARTICLE 3
TYPE OF ACTIVITIES REQUIRING FRANCHISES, PERMITS OR PRIVILEGES

Sec. 13.7. Method of Granting Franchise.

Every franchise, permit or privilege hereinafter enumerated in this article shall be granted by this chapter in accordance with the method of procedure prescribed by this chapter. The franchises, permits or privileges contemplated by this chapter shall include the following:

(1) Every franchise, permit or privilege to construct, maintain or operate a street railroad along, upon, over, in, under or across any street, lane, alley, court, highway, road or other public place.

(2) Every franchise, permit or privilege to construct, maintain or operate an interurban railroad along, upon, over, in, under or across any street, lane, alley, court, highway, road or other place, and whether the same is to be operated on the surface, in subways or upon an elevated structure.

(3) Every franchise, permit or privilege to construct, operate or maintain an underground street railroad through subways, and for the construction, operation and maintenance of elevated street railways along, across, under in or over any street, highway, lane, court, alley or any other place; every franchise, permit or privilege to construct, maintain or operate pipes, tubes, tunnels, or conduits along, upon, over, in, under or across any lane, street, alley, court, highway, road or other public place in said street for the purpose of transmitting water, gas, steam, heat, oil, air, substances for refrigerating;

containers with merchandise through compressed air tubes, or other substance or utility.

(4) Every franchise, permit or privilege to erect, construct, lay, maintain and operate poles, pipes, conduits, wires or cable upon, over, under, in, across or along any street, lane, court, highway, road or other place in said City for the purpose of transmitting power, heat, electricity or electric energy, or for communication by telephone, telegraph or signal system.

(5) Every franchise, permit or privilege for the construction and operation of any other plants necessary or convenient for furnishing the City and its inhabitants with transportation, communication, terminal facilities, water, light, heat, power, refrigeration, storage or any other public service.

* * *

ARTICLE 4
APPLICATION FOR FRANCHISE, PERMIT OR PRIVILEGE

Sec. 13.11. Written Application Required.

Every applicant for a franchise, permit or privilege mentioned in Section 13.7 of this chapter shall file, or heretofore shall have filed, with the Council application therefor in writing setting forth in such application the name and address of such applicant, a description of the franchise, permit or privilege applied for, and the streets, highways or other places along, upon, over, in, under or across which it is proposed to exercise such franchise, permit or privilege.

Sec. 13.12. Report to Council.

Every application made to the Council for a franchise, permit or privilege mentioned in this chapter shall, before any action is taken thereon, be referred by the Council to Board of Transportation Commissioners for the recommendation respecting the same. The Board of Transportation Commissioners shall proceed to inquire into such application and, within thirty (30) days after such application shall have been referred to it, or longer if allowed by the Council, shall report to the Council its recommendation relative thereto. If, in the judgment of the said Board of Transportation Commissioners, the franchise permit or privilege applied for should not be advertised for sale or granted, it shall so report, stating its reasons therefor; and if, in the judgment of said Board, such franchise, permit or privilege should be granted, it shall recommend the terms and conditions upon which the same shall be granted.

Sec. 13.13. Sale of Franchise, Permit or Privilege.

No franchise, permit or privilege mentioned in this chapter shall be advertised for sale or granted unless the application therefor shall have been referred to the Board of Transportation Commissioners provided, however, that if said Board shall fail to report thereon within the time prescribed, of [sic] as extended by the Council, nothing herein contained shall be construed to prevent the Council, in its discretion, from proceeding to advertise such franchise, permit or privilege for sale or from awarding the same as provided by this chapter.

Sec. 13.14. Board Approval Required – Exception.

No franchise, permit or privilege mentioned in this chapter shall be offered for sale or granted, contrary to the recommendations of said Board of Transportation Commissioners except upon three-fourths (3/4) vote of the entire Council.

Sec. 13.15. Board of Telecommunications Commissioners.

For purposes of this article, all references to, and all powers, duties, and responsibilities exercised by, the Board of Transportation Commissioners, shall instead be exercised by the Board of Telecommunications Commissioners whenever the subject involves a telecommunications system or franchise, including cable television franchises, and the Board of Telecommunications Commissioners shall have all the powers and duties required for that purpose and for other purposes of Chapter 23 consistent with the exceptions specified in Article 1 of Chapter 23. The term "**telecommunications**" is defined for this purpose as set forth in Section 13.54 of this Code.

ARTICLE 5
NOTICE OF INTENTION TO GRANT FRANCHISE, PERMIT OR PRIVILEGE

Sec. 13.17. Publication of Advertisement.

The Council shall, if it proposes to grant any such franchise, permit or privilege, advertise the fact of such application, together with the statement that it is proposed to grant the same once in a newspaper of general circulation printed, published and circulated in said City.

Sec. 13.18. Contents of Advertisement.

Such advertisement shall state the character of the franchise, permit or privilege proposed to be granted, and if it be for a street railroad or an interurban railroad or an underground or elevated street or interurban railroad, the route to be traversed, shall state the amount of the bond required to be filed by the Grantee to insure the faithful performance of the conditions of such franchise; shall state, (except in the case of a franchise granted for ten (10) years to replace a franchise about to expire), that sealed bids therefor will be opened at a stated time and place, and that the franchise, permit or privilege will be awarded to the bidder offering:

A. To pay to the City, during the life of the franchise, permit or privilege, the highest percentage of gross annual receipts received from the use, operation or possession of such franchise, permit or privilege, provided, that such percentage of gross annual receipts shall not be less than two per cent (2%) of such gross annual receipts; or

B. To pay to the City such other compensation or consideration for the use, permit or privilege as may be prescribed by the Council in the advertisement for bids and notice of sale; . . .

C. The terms and conditions to be imposed upon the Grantee on account of the use, operation or possession of such franchise, permit or privilege, shall be included in said advertisement for bids and notice of sale.

ARTICLE 6
PROCEDURE FOR RECEIVING BIDS AND AWARDING FRANCHISE, PERMITS OR PRIVILEGE

Sec. 13.21. Sealed Bids, Declaration, Cash Deposit.

All sealed bids shall be delivered to and filed with the City Clerk and at the time and place specified in said advertisement the Council shall, in open session, examine and publicly declare the same, provided, however, that no bid shall be considered unless accompanied by a cash deposit or a certified check as hereinafter provided.

Sec. 13.22. Raising Bids.

Upon the opening and declaration of such bids by the Council, any responsible person, firm or corporation present or represented, then accompanying his or its bid with a cash deposit or certified check equivalent to that required to be filed with sealed bids, may raise the bid for such franchise, permit or privilege above the highest sealed bid therefor, on any one of the bases of compensation as prescribed under Section 13.11, of this Code, and included in the advertisement for bids and notice of sale. Such bidding may thereafter continue until finally such franchise, permit or privilege shall be struck off, sold, and awarded by the Council to the highest bidder; provided that if, in the judgment of the Council, no adequate or responsible bid has been made, the Council may withdraw any franchise, permit or privilege from sale, or advertisement for new bids.

ARTICLE 7
DEPOSIT REQUIRED

Sec. 13.25. Posting Deposit.

Every application for a franchise, permit or privilege shall be accompanied by a cash deposit of not less than Two Hundred Dollars ($200.00), or by a certified check for said amount payable to the City Treasurer and certified to by some responsible bank in the City of Los Angeles as a fund out of which to pay an expenses connected with such application, and every bid shall be accompanied by a cash deposit of not less than Five Hundred Dollars ($500.00), or a certified check for said amount, payable to the City Treasurer, certified to by some responsible bank in the City of Los Angeles as a guarantee of good faith by the bidder.

Sec. 13.25.1. Amount of Deposit.

Every application, as referred to in Section 13.25, for the following types of franchises shall be accompanied by a cash deposit, or by a certified check for said amount, payable to the City Treasurer and certified by some responsible bank in the City of Los Angeles as a fund out of which to pay all expenses connected with such application as follows:

Each application for a cable television franchise – $3,000.00
Each application for a pipeline franchise – $3,000.00
Each application for a railroad franchise – $1,000.00

Sec. 13.26. Returning of Deposit.

Upon the franchise, permit or privilege being awarded, all deposits paid by unsuccessful bidders shall be returned. The deposit of the successful bidder shall be retained until the approval and filing of a bond hereinafter provided for, whereupon the Five Hundred Dollar deposit shall be returned and the remainder, if any, of the Two Hundred Dollars (or such other deposit amount which has been established) after the payment therefrom of all expenses incurred by the City in connection with the advertising, engineering, clerical work and awarding of said franchise, permit or privilege, shall be returned.

ARTICLE 8
GENERAL PROVISIONS

Sec. 13.29. Restriction on Contents of Advertisement.

No clause or condition of any kind shall be inserted in any advertisement of any franchise, permit or privilege offered for sale under the terms of this chapter which shall directly or indirectly restrict free and open competition in bidding therefor.

Sec. 13.30. Bond Required.

The Grantee of such franchise, permit or privilege shall, within five (5) days after the awarding of such contract, permit or privilege, filed with the City Clerk of the said City a bond running to the said City in the penal sum fixed by the Council in the advertisement for bids and within thirty (30) days after the filing and approval of such bond, such franchise, permit or privilege shall be

granted by ordinance, subject to the referendary provision of the Charter, to the person, firm or corporation to whom it shall have been struck off, sold or awarded; and in case such bond shall not be so filed the award of such franchise, permit or privilege shall be set aside and shall, in the discretion of the Council, be re-advertised and again offered for sale in the same manner and under the same restrictions as hereinbefore provided, and the amount deposited by such builder with his bid shall be forfeited to the City as liquidated damages.

* * *

ARTICLE 9
RESERVATIONS

Sec. 13.34. Rights and Privileges Reserved by City.

Every franchise, permit or privilege for the construction, extension or operation of a utility requiring a franchise, shall reserve to the City certain rights and privileges, as follows:

1. The right to revoke, for noncompliance with any of the conditions of the franchise.

2. The right to purchase the property of such utility or to find a purchaser therefor in accordance with the following procedure:

a. The City may purchase any utility at any time after five (5) years from the date that such franchise becomes effective, by delivering a notice in writing of such intention to purchase, at least one (1) year prior to the date upon which the City proposes to exercise its right to purchase said utility; together with a notice in writing of the intention of said City to purchase and take

over said property of such utility at the date fixed for the purchase of said utility, or to find a purchaser therefor, upon the payment by said City, or said purchaser, to said Grantee owning such property under said franchise of the fair value of the property of such utility, as hereinafter provided.

* * *

ARTICLE 11
POWER TO ORDER EXTENSION OF FACILITIES

Sec. 13.40. Determination by Board, Notice, Hearing.

Every grant of every such franchise, permit or privilege shall provide that the Board of Transportation Commissioners (subject to appeal to the Council) shall have the power to order extensions of the facilities authorized therein, provided that the Board of Transportation Commissioners shall have determined after a hearing duly had and of which the utility has had the notice at least thirty 30 days prior to such hearing, that public necessity and convenience require the extension; provided, however, that if such extension of facilities is for construction or operation outside of the original franchise to which it will connect (except extensions granted to indeterminate franchise which extension shall become a part of the aggregate property of such Grantee and shall be subject to all the obligations and rights in favor of the City applicable to the property of the Grantee by virtue of such indeterminate franchise), then the utility shall not be required to comply with such order until the Council shall have guaranteed such additional franchise rights as may be required to cover such extension.

Sec. 13.41. Appeal From Determination by Board.

Every such order for extension, by the Board of Transportation Commissioners, shall be subject to appeal to the Council. Such appeal shall be made within fifteen (15) days after the making of such order by filing a written notice thereof with the Council. Such notice shall state the grounds upon which the appeal is made and thereupon the Council shall consider such appeal and within thirty (30) days thereafter shall either affirm or revoke or modify such order of the Board; and unless such action is taken by the Council within said period of thirty (30) days the order of the Board of Transportation Commissioners shall become final.

Sec. 13.42. Board of Telecommunications Commissioners.

For purposes of this article, all references to, and all powers, duties, and responsibilities exercised by, the Board of Transportation Commissioners, shall instead be exercised by the Board of Telecommunications Commissioners whenever the subject involves a telecommunications system or franchise, including cable television franchises, and the Board of Telecommunications Commissioners shall have all the powers and duties required for that purpose and for other purposes of Chapter 23 consistent with the exceptions specified in Article 1 of Chapter 23. The term "**telecommunications**" is defined for this purpose as set forth in Section 13.54 of this Code.

ARTICLE 13
POWER OF COUNCIL

Sec. 13.50. Council May Add Conditions.

Nothing in this chapter shall be construed as preventing the Council from inserting in any advertisement for bids and notice of sale, or in any ordinance granting any franchise, permit or privilege any conditions or requirements not inconsistent with the provisions of the Constitution of the State, or of the City Charter.

CHAPTER 2
TELECOMMUNICATIONS SYSTEMS

ARTICLE 1
REGULATION OF TELECOMMUNICATIONS SYSTEMS

Sec. 13.54. Definitions.

For the purposes of this article, unless the context otherwise requires, each of the following words and phrases has the meaning herein stated when used in this article.

(a) **Board.** The Board of Telecommunications Commissioners.

(b) **City.** The City of Los Angeles of the State of California in its governmental capacity.

(c) **Council.** The City Council of the City of Los Angeles.

(d) **Grantee.** Each and every person or corporation heretofore or hereafter constructing, maintaining or operating a Community Antenna

Television System pursuant to franchise rights granted by the City.

(e) **Person.** Any person, firm, partnership, association, corporation, company or organization of any kind.

(f) **Person and Corporation.** Includes but is not limited to lessees, trustees, receivers or trustees appointed by any court whatsoever, of the person or corporation.

(g) **Public or Any Portion Thereof.** The public generally, or any limited portion of the pubic [sic], including a person, private corporation, municipality, or other political subdivision of the State for which Grantee performs services, installs facilities, or distributes television signals.

(h) **Rates.** Rates, tolls, rentals and charges of any kind.

(i) **Telecommunications Systems.** Telecommunications Systems are those which enable the transmission of writing, signs, signals, pictures, numbers and sounds of all kinds by aid of wire, cable, radio, satellite, microwave or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services including the receipt, forwarding, and delivery of communications incidental to such transmission consistent with the exceptions specified in Chapter 23, Article 1, Section 22.590, Division 13 of the Los Angeles Administrative Code.

Sec. 13.56. Regulations and Orders of Board.

The rates charged and services provided to the public by each and every Grantee shall at all times conform to such regulations and orders as shall, from time to time, be established and prescribed by the Board under this chapter; provided, however, that any resolution fixing rates must be approved by the City Council, by ordinance, before taking effect.

Sec. 13.57. Opportunity to be Heard.

Nothing in this article shall be construed to deny to any person affected by an order or resolution of the Board an opportunity to be heard by said Board regarding such resolution or order, subject however to such procedural rules as the Board may prescribe.

Sec. 13.58. The Powers of City to Implement.

The City may exercise any right or power necessary or convenient to the implementation or enforcement of this article.

Sec. 13.59. Applicability of Article.

Nothing in this article shall relieve a Grantee of any requirement of any ordinance, rule, regulation or specification of the City imposed by franchise or in any other manner upon said Grantee.

ARTICLE 2
PROHIBITIONS

Sec. 13.62. Necessity for a Franchise.

(a) No person, firm, corporation, or organization of any kind shall construct, maintain or

operate any telecommunications system any place in the City of Los Angeles unless such person, firm, corporation, or organization shall have obtained a franchise from the City therefor. Any such franchise shall be obtained in accordance with the provisions of the Charter of the City and of the procedure prescribed by Chapter 1 of Division 13 of this Code, and shall be subject to the provisions of the ordinance granting such franchise unless preempted by State or Federal law.

Those powers, duties and responsibilities exercised by the Board of Transportation Commissioners set forth in said Chapter 1 of Division 13 of this Code, including but not limited to Sections 13.12, 13.13, 13.14, 13.40, and 13.41, shall instead be exercised by the Board of Telecommunications Commissioners to the extent that such may apply to telecommunications systems or franchises, including cable television franchises.

(b) No person, firm, corporation or organization of any kind shall hereafter construct additions to or expand in any way existing telecommunications system unless such construction or expansion is authorized under the terms of a franchise held by such person, firm, corporation or organization.

(LOGO) Pacific Telephone

CF 0041 (1-81)
(Ref.: BSP 001-310-110PT)

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, hereinafter called "Licensor", and _____, hereinafter called "Licensee", mutually agree that the following terms and conditions shall govern Licensee's use of underground conduit, manholes and handholes, hereinafter called "conduit system", and poles in which Licensor has an ownership or other interest located within the areas in or near the _____, County of _____, State of California, which are delineated on the map hereto attached, marked "Exhibit A", and hereby made a part hereof. Said conduit system and poles are hereinafter collectively called "outside plant."

1. Licensee's use of said outside plant shall be confined to supporting those cables, wires, appliances, and other appurtenances, all hereinafter called "equipment", which Licensor has given Licensee written permission to install. Licensee shall not use the equipment attached to or placed in Licensor's outside plant for any unlawful purpose.

2. Whenever Licensee shall desire to place equipment on or in any of said outside plant, Licensee shall make written application, in triplicate, to Licensor for permission to do so, substantially in the form hereto attached, marked "Exhibit B" or "Exhibit C", and hereby made a part hereof. If said application is approved, permission to place the equipment described in said application on or in the outside plant therein identified shall be granted by Licensor, subject to the terms and conditions

of said application, by signing one copy of said application in the place provided thereon for that purpose and returning said signed copy to Licensee. Licensor may, from time to time, supplement and revise the work rules and basic construction requirements as shown on Exhibits B and C attached hereto.

3. Upon receiving said signed copy of said application, but not before, Licensee shall have the right to install, maintain and use its equipment described in said application on or in the outside plant identified therein, subject to the terms and conditions of said application; provided, however, that before commencing any such installation Licensee shall notify Licensor of the time when it proposes to do said work sufficiently in advance thereof so that Licensor may arrange to have its representative present when such work is performed.

4. (a) Licensee shall not have the right to place, nor shall it place, any additional equipment on or in the outside plant used by it hereunder without first making application for and receiving permission to do so, all as prescribed in paragraph numbered 2 hereof; nor shall Licensee change the position of any equipment on or in the outside plant hereunder without Licensor's prior written approval.

(b) If Licensor finds that Licensee has placed any equipment on or in any part or parts of said outside plant without first making written application for and receiving permission to do so, Licensor, without prejudice to its other rights or remedies under this agreement or otherwise may (i) impose a fee therefor and (ii) require Licensee to remove such equipment forthwith or Licensor

may remove said equipment at the sole risk and expense of Licensee. Licensee shall pay Licensor upon demand for Licensor's charges for such removal. Licensor shall incur no liability by reason of such removal. The fee imposed upon the Licensee for the unpermitted use of Licensor's outside plant shall be an amount equal to three (3) times the annual charges which would have been applicable pursuant to paragraph 12 hereof had application first been made and permission granted for the unpermitted use of Licensor's outside plant. Any such fee imposed by Licensor shall be in addition to its rights to any other sums due and payable and to any claims or damages under this agreement or otherwise. No act or failure to act by Licensor with regard to said fee or said unpermitted use shall be deemed as a ratification or the giving of permission for such use. If permission should subsequently be given for such use after Licensee has made written application therefor, said permission shall not operate retroactively or constitute a waiver by Licensor of any of its rights or privileges under this agreement or otherwise.

5. (a) Licensee, subject to the provisions of Licensor's work rules, shall, at its own sole risk and expense, place and maintain said equipment on or in said outside plant (i) in a safe condition and in thorough repair, (ii) in a manner suitable to Licensor and so as not to conflict or interfere with the working use of said outside plant by Licensor or others using said outside plant or with the working use of facilities of Licensor or others on or in or from time to time placed on or in said outside plant, and (iii) in conformity with such requirements and specifications as Licensor shall from time to time prescribe and

with all laws, and the regulations, orders and decrees of all lawfully constituted bodies and tribunals, pertaining to construction of Class C communications facilities including, without limiting the scope of the foregoing, General Order No. 95 and No. 128 of the Public Utilities Commission of the State of California, and any supplements thereto and revisions thereof.

(b) Licensee shall complete the placement of its equipment on or in the part or parts of said outside plant covered by each approved individual application within such time limit as Licensor shall designate on said application for such placement; provided, however, that the time, as determined by Licensor, of any delays in such completion caused solely by Licensor shall be added to such time limit. In the event Licensee should fail to complete the placement of such equipment within said prescribed time limit, the permission given by Licensor to place said equipment shall thereby automatically be revoked and Licensee shall not have the right to place said equipment without first reapplying for and receiving permission to do so, all as prescribed in paragraph numbered 2 hereof.

(c) Licensor shall have the right to require Licensee to suspend immediately any work being performed or to be performed by Licensee hereunder whenever in Licensor's sole opinion such work is being performed or is to be performed in a manner contrary to any of the provisions of this agreement or in any manner which might cause injury to persons or damage to property. Licensee shall not resume any such work until Licensor has given Licensee approval to do so.

6. (a) If in the judgment of Licensor, the accommodation of any of Licensee's equipment necessitates the rearrangement of existing facilities on or in said outside plant, the replacement of any part or parts of said outside plant or any other work of whatsoever kind or nature on or in said outside plant including, but not limited to the termination of Licensee's conduit in a manhole of Licensor, Licensor will indicate on said application the necessary work and the estimated cost thereof and return it to Licensee. If Licensee still desires to use said outside plant and returns the application marked to so indicate, Licensor will make such replacement and perform such other work on or in said outside plant, and Licensor will make, and will request other owners, if any, of said existing facilities to make, such rearrangements or transfers of said existing facilities as may be required, all at the sole risk and expense of Licensee. Licensee, on demand, will pay to Licensor and to each such other owner their charges for making the replacements, rearrangements and transfers and performing the other work. Licensor shall not be responsible to Licensee for any loss sustained by Licensee by reason of the failure of any such other owner to make such rearrangements or transfers.

(b) If in Licensor's judgment, Licensee's existing equipment on or in any outside plant interferes with or prevents the placing of any facilities thereon or therein required by Licensor or by any other owner of an interest in or of facilities on or in said outside plant, and if said facilities could be placed on or in said outside plant by removing Licensee's equipment therefrom, or by rearranging the existing facilities (excluding rearrangement

of Licensee's equipment alone) thereon or therein, Licensor may notify Licensee of the rearrangements of existing facilities or outside plant replacement and transfers of existing facilities required in order to continue the accommodation of Licensee's equipment, together with an estimate of the cost of making any such changes; and if Licensee desires to continue to maintain its equipment on or in said outside plant or such replacing outside plant and so notifies Licensor, Licensor will make such outside plant replacement if required, and Licensor will make, and will request other owners, if any, of said existing facilities to make, such rearrangements or transfers of said existing facilities, all at the sole risk and expense of Licensee, and Licensee, on demand, will reimburse Licensor and each such other owner for the entire expense thereby incurred by each of them. Licensor shall not be responsible to Licensee for any loss sustained by Licensee by reason of the failure of any such other owner to make such rearrangements or transfers. If Licensee does not so notify Licensor, Licensee shall, subject to the provisions of Licensor's work rules, remove its equipment from such outside plant within thirty (30) days from such notification from Licensor.

7. Nothing in this agreement shall be construed to obligate Licensor to grant Licensee permission to use any particular outside plant. In the construction and maintenance of any of its outside plant, Licensee agrees to conform to the requirements of General Order No. 95 and No. 128 of the Public Utilities Commission of the State of California, and any supplements thereto and revisions thereof.

8. Licenseor [sic] reserves to itself and to each other owner of facilities on or in said outside plant the right to maintain said outside plant and to operate their facilities thereon or therein in such a manner as well [sic] best enable them to fulfill their own service requirements, and neither Licensor nor any said other owner shall be liable to Licensee for any interruption to Licensee's service or for any interference with the operation of Licensee's equipment arising in any manner from the use of said outside plant and the facilities thereon or therein by Licensor and each said other owner.

9. Licensee will obtain from public authorities and private owners of real property any and all permits, licenses or grants necessary for the lawful exercise of the permission granted by any application approved hereunder; and Licensee shall submit to Licensor evidence of compliance with the foregoing requirements prior to or at the time of making application for permission to place said equipment on or in said outside plant.

10. Licensee shall at any time, at its own sole risk and expense, upon notice from Licensor, relocate, replace or renew said equipment or transfer it to replacing outside plant, or perform any other work in connection with said equipment that may be required by Licensor; provided, however, that in cases of emergency, Licensor may, at Licensee's sole risk and expense, relocate, replace or renew said equipment, transfer it to replacing outside plant or perform any other work in connection with said equipment that may be required in the maintenance, replacement, removal or relocation of said outside plant or the facilities thereon or therein or which may be placed thereon or therein, or for the service needs of Licensor or

any other owner of an interest in said outside plant or of facilities thereon or therein, and Licensee, on demand will reimburse Licensor for the entire expense thereby incurred.

11. Licensee may at any time, subject to the provisions of Licensor's work rules, remove its equipment from any of said outside plant and, in each such case, Licensee shall immediately give Licensor written notice of such removal in the number of copies and in the form from time to time prescribed by Licensor. Removal of said equipment from any part of said outside plant shall constitute a termination of Licensee's right to use such part.

12. For the privilege of placing and maintaining said equipment on or in said outside plant, Licensee shall pay to Licensor amounts to be computed as of the first day of January and as of the first day of July of each calendar year during the existence of this agreement in accordance with the following applicable formula(e):

(a) Pole Attachments:

(A x B) + (C x D) = Total amount of semiannual payment.

A = Total number of cable attachments to said poles as of the date of computation.

B = $1.25

C = Total number of amplifiers attached to said poles as of the date of computation.

D = $.50

(b) Conduit:

(A x B) and/or (C x D) = Total amount of semiannual payment.

A = Total number of duct feet occupied as of the date of computation (i) where Licensee's cable is in a duct occupied by Licensor's cable or the cable of another authorized user or (ii) where Licensee's cable is in a vacant duct where in Licensor's judgment, subsequent cable placement is practicable.

B = $.15

C = Total number of duct feet occupied as of the date of computation where Licensee's cable is placed in a vacant duct and it is of such a type and size to preclude the subsequent placement of additional cable.

D = $.30

By giving six (6) months' notice to Licensee, Licensor may from time to time increase or decrease the rates, or any of them, specified in (a) and (b) of this paragraph 12 effective as of the date on which the semiannual payment hereinabove provided for is to be computed next following the expiration of said six (6) months. If any such changed rate is not acceptable to Licensee, Licensee may terminate this agreement as hereinafter provided.

13. No use, however extended, of any of said outside plant under this agreement shall create or vest in Licensee any ownership or property rights therein, but Licensee's rights therein shall be and remain a mere license. Nothing herein contained shall be construed to compel Licensor to maintain any particular outside plant for a period longer than demanded by its own service requirements.

14. Licensee shall exercise special precaution to avoid Licensee's causing damage to the facilities of Licensor and others on or in said outside plant, and Licensee shall assume all responsibility for any and all loss from such damage. Licensee shall make an immediate report of the occurrence of any such damage to the owner of the damaged facilities and shall, on demand, reimburse said owner for the entire expense incurred in making repairs.

15. Licensor, at Licensee's expense, shall have the right to inspect each new installation of Licensee's equipment on and in the vicinity of said outside plant and to make periodic inspections, semi-annually or oftener as plant conditions may warrant, of such of Licensee's plant as it deems necessary. Such inspections, made or not, shall not relieve Licensee of any responsibility, obligation or liability assumed under this agreement. Licensee shall pay Licensor upon demand Licensor's expense for making such inspections.

16. Licensee shall indemnify and hold harmless Licensor and other owners of an interest in or of facilities on or in said outside plant, and each of them, and their respective heirs, administrators, executors, successors and assigns, against and from any and all claims, demands, causes of action, damages, costs or liabilities, in law or in equity, of every kind and nature whatsoever, directly or proximately resulting from or caused by (i) the installation, maintenance, use or removal of said equipment on, in or from said outside plant, regardless of negligence of Licensor with the exception of the sole negligence or willfull misconduct of Licensor or Licensor's agents, servants or independent contractors who are

directly responsible to Licensor, or (ii) interruption, discontinuance or interference with Licensee's transmission of signals by or through said equipment occasioned or claimed to have been occasioned by any action of Licensor or each other such owner, or any two or more of them, pursuant to or consistent with this agreement, regardless of negligence of Licensor be it sole, active or passive; and Licensee shall, upon demand and at its own sole risk and expense, defend any and all suits, actions or other legal proceedings which may be brought or instituted by third persons against Licensor, or any other such owner, or any two or more of them, or their respective heirs, administrators, executors, successors or assigns, on any such claim, demand or cause of action; and shall pay and satisfy any judgment or decree which may be rendered against Licensor, or any other such owner, or any two or more of them, or their respective heirs, administrators, executors, successors or assigns, in any such suit, action or other legal proceedings, and further, Licensee shall reimburse Licensor and each other such owner for any and all legal expense incurred by each of them in connection therewith.

17. Throughout the life of this agreement Licensee shall maintain in full force and effect with a carrier or carriers selected by Licensee and satisfactory to Licensor.

(a) Compensation Insurance in compliance with all Workmen's Compensation Insurance and Safety Laws of the State of California and amendments thereto;

(b) Bodily Injury Liability Insurance with limits of $200,000, each person, and $500,000, each occurrence; and

(C) Property Damage Liability Insurance with limits of $50,000, each accident, and $100,000, aggregate.

The insurance described in (b) and (c) above, shall also provide contractual liability coverage satisfactory to Licensor with respect to liability assumed by Licensee under the provisions of paragraph numbered 16 hereof. Written proof of compliance with the requirements of this paragraph numbered 17 shall be filed with and approved by Licensor prior to the installation of any said equipment on or in said outside plant.

18. Licensor shall have the right to require Licensee to furnish a bond to cover the faithful performance by Licensee of its obligations to make the payments provided for in paragraphs numbered 4, 6, 12, 15 and 20 hereof; to pay the premiums for the insurance provided for in paragraph numbered 17 hereof; and to remove or to pay for the removal of its equipment from said outside plant, or any of them, if this agreement should be terminated in whole or in part pursuant to paragraph numbered 19 or paragraph numbered 25 hereof. If such a bond is required by Licensor, it shall be issued by a commercial bonding company selected by Licensee and satisfactory to Licensor; shall not be subject to termination or cancellation except upon ninety (90) days' prior written notice by certified mail to Licensor; shall be in such form and in such amount as Licensor shall specify from time to time; and, subject to termination or cancellation as aforesaid, shall be maintained in full force and effect throughout the life of this agreement.

19. If the Surety on the bond mentioned in paragraph numbered 18 hereof should give notice of the

termination of said bond, or if Licensee should default in its obligations under paragraph numbered 17 hereof, or if Licensee should default in any other of its obligations under this agreement and such default shall continue for thirty (30) days after written notice thereof, Licensor may, by written notice to Licensee, forthwith terminate this agreement or forthwith terminate any or all permits granted by it hereunder, and Licensee shall remove, subject to the provisions of Licensor's work rules, its equipment from the outside plant to which said termination applies within thirty (30) days from such notification.

20. (a) If Licensee should default in the performance of any work which it is obligated to do under this agreement except the work of removing its equipment from any outside plant within the time allowed for such work, Licensor may elect to do such work at Licensee's sole risk and expense and Licensee on demand shall reimburse Licensor for the entire expense thereby incurred.

(b) If Licensee should default in the removal of any of its equipment which it is obligated under this agreement to remove from any part or parts of said outside plant within the time allowed for such removal, Licensor may elect, by a written notice to Licensee, (i) to remove said equipment at Licensee's sole risk and expense in which event Licensee shall pay Licensor on demand its charges for performing such removal, or (ii) to become the sole and absolute owner of said equipment in which event title to said equipment shall vest in Licensor as of the date of such written notice.

21. If Licensor or any other owner or owners of an interest in or of facilities on or in said outside plant

should bring any suit, action of [sic] other legal proceeding against Licensee, it or they shall be entitled to recover, in addition to any judgment or decree for costs, such reasonable attorney's fees as it or they may have incurred in such suit, action or other legal proceeding.

22. The failure of Licensor to enforce any provision of this agreement or the waiver thereof in any instance shall not be construed as a general waiver or relinquishment on its part of any such provision but the same shall nevertheless be and remain in full force and effect.

23. All amounts payable by Licensee to Licensor or others under the provisions of this agreement shall, unless otherwise specified, be payable within thirty (30) days after presentation of bills therefor. Nonpayment of any such amount when due shall constitute a default of this agreement.

24. Nothing herein contained shall be construed as affecting any rights or privileges previously conferred by Licensor or any other owner of an interest in or of facilities on or in said outside plant, by contract or otherwise, upon others to use any outside plant covered by this agreement; and Licensor and each other such owner shall have the right to continue and extend such rights or privileges. The privileges herein granted to Licensee shall at all times be subject to any such existing contracts and arrangements.

25. Unless sooner terminated as herein provided, this agreement shall remain in effect for a term of one (1) year from the date hereof, and shall continue in effect thereafter, subject to termination in whole or in part by at least six (6) months' prior notice in writing from either

party to the other. At the expiration of the period specified in said notice, all rights and privileges of Licensee hereunder as to the outside plant affected by said notice shall forthwith terminate, and Licensee shall remove said equipment from said poles within said period.

Any termination of this agreement in whole or in part shall not release Licensee from any liability or obligation hereunder, whether of indemnity or otherwise, which may have accrued or which may be accruing or which arises out of any claim that may have accrued or may be accruing at the time of termination.

26. Licensee shall not, without the prior consent in writing of Licensor, assign, transfer or sublet any privilege granted to it hereunder, nor shall it, without such consent, assign, transfer, sublet or permit any other person to use any of its said equipment placed in or on Licensor's outside plant. Subject to the foregoing, this agreement shall inure to the benefit of and be binding upon the respective heirs, administrators, executors, successors and assigns of the parties hereto.

27. Wherever in this agreement notice is provided or required to be given by either party hereto to the other, such notice shall be in writing and transmitted by United States mail or by personal delivery to Licensor at its office at _____

_____

or to Licensee at its office at _____

_____

as the case may be, or to such other address as either party hereto may, from time to time, designate for that purpose.

28. This agreement shall be subject to such changes or modifications as may be required or authorized by any regulatory commission in the exercise of its lawful jurisdiction, and any modification, revision, renewal or extension of this agreement shall so state.

29. The Company declares that the filing of the contract herein with the Public Utilities Commission pursuant to the procedural requirements of General Order No. 96-A is not to be construed as a public offering by the Company of the services or facilities hereinabove referred to.

Dated: _____, 19__.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY

By _____
Title _____

By _____
Title _____

EXHIBIT "A"

BOUNDARY MAP

* * *

EXHIBIT "B"

The Pacific Telephone and
Telegraph Company

_____

_____

In accordance with the terms of the agreement dated _____, 19___, covering the use of your poles located

_____

_____

_____

_____

County of _____, State of California, we hereby request permission to place and maintain certain equipment on certain poles, all as more particularly described and delineated on this [sic] sketch and diagram appearing on the attached drawings.

Dated _____, 19___. Licensee _____

By _____

Title _____

_____

_____

Permission is hereby granted to place the above-described equipment on the above-identified poles, subject to the following:

(1) The terms and conditions of the above-mentioned agreement.

(2) Receiving advance payment for and authorization to make, at your sole risk and expense, the changes and rearrangements detailed on the attached sheet estimated to cost $ _____.

(3) Completion of said changes and rearrangements by us.

(4) Installation of said equipment on said poles shall be completed within _____ days from the date of notification by us that said changes and rearrangements have been completed, failing which the permission hereby granted shall automatically be revoked.

(5) Notification of start of installation to us at _____ not less than 40 hours in advance of installation so we can have a representative present when work is performed.

(6) Attached work rules and basic construction requirements and any supplements or revisions thereof that Licensor may from time to time prescribe.

Dated: _____, 19___. THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY

By _____

Title _____

You are hereby authorized to make the above-mentioned changes and rearrangements, if any, at our risk and expense. In accordance with paragraph 9 of said agreement, all permits, licenses or grants have been obtained for the attachments covered by this permit.

Dated: _____, 19___. _____

By _____

Title _____ _____

_____

EXHIBIT "C"

The Pacific Telephone and
Telegraph Company

_____

_____

In accordance with the terms of the agreement dated _____, 19___, covering the use of your conduit system located _____

_____

_____

_____

County of _____, State of California, we hereby request permission to place and maintain certain equipment in that certain conduit, all as more particularly described and delineated on the sketch and diagram appearing on the attached drawings.

Dated _____, 19___. Licensee _____

By _____

Title _____

_____

_____

Permission to use the above identified conduit system is hereby granted subject to the following:

(1) The terms and conditions of the above-mentioned agreement.

(2) Receiving advance payment for and authorization to perform, at your sole risk and expense, the work detailed on the attached sheet(s), estimated to cost $ _____.

(3) Completion of said work by us.

(4) Notification to us at _____

(a) at least ___ hours in advance of the time you will have your cable at the site of the work if such cable is to be placed by us; or

(b) at least ___ hours in advance of the time you desire to start work to be performed by you if the placing of your cable by us is not involved.

(5) Attached work rules and basic construction requirements and any supplement thereto and revisions thereof that Licensor may from time to time prescribe.

Dated: _____, 19___. THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY

By _____

Title _____

You are hereby authorized to perform the above mentioned work at our risk and expense. In accordance with paragraph 9 of said agreement, all permits, licenses or

grants have been obtained for that conduit covered by this permit.

Dated: _____, 19___. _____

By _____

Title _____

_____

WORK RULES (EXHIBIT "C")

1. Licensee shall be responsible for the proper design and maintenance of Licensee's cable and other equipment occupying Licensor's conduit system, manholes, or hand holes.

2. While many of the standards and technical requirements for Licensee's cable, equipment and facilities are set forth herein, Licensor reserves the right to specify the type of construction required in situations not otherwise covered in this agreement. In such cases, Licensor will at its discretion furnish to Licensee written materials which will specify and/or explain the required construction.

3. Unless otherwise first agreed upon in writing by Licensor and Licensee, Licensor, at Licensee's sole risk and expense, shall

(a) upon receiving sufficient advance notice from Licensee, furnish at the site or sites of Licensee's work in said conduit system, such representative or representatives of Licensor as Licensor in its sole opinion deems necessary to observe Licensee's work, such presentative or representative to be present at such site or sites at all times while Licensee is performing work in said conduit system;

(b) remove and replace the covers of all manholes and hand holes in which Licensee finds it necessary at any time to perform work;

(c) make appropriate inspections and tests in manholes for the presence of combustible and toxic gases and fluids before any person enters any manhole, and furnish forced air ventilation of manholes in accordance with Licensor's standard practices at all times while the manholes are occupied by workmen;

(d) rod and clean such parts of said conduit system as Licensor deems necessary in advance of the placing of any of said equipment;

(e) furnish and place in and around the work area at each manhole in which work is performed protective and warning devices such as barricades, warning lights, traffic cones and danger signs in accordance with Licensor's standard practices;

(f) pump or otherwise remove water or any other substance from manholes to the extent Licensor deems necessary to permit performance of work in such manholes;

(g) place and remove any and all cables of Licensee which are to be placed in or removed from (i) any of said underground conduits in which Licensor has an ownership or other interest or (ii) any other conduit occupied by a cable or cables of Licensor;

(h) perform any and all work of bonding said equipment to Licensor's facilities; and

(i) perform such other work in connection with the placing of said equipment in said conduit system as

Licensor in its sole opinion deems necessary in order to avoid damage to said conduit system or the facilities of Licensor or others therein.

4. Licensee shall

(a) notify Licensor sufficiently in advance of the time when any work is to be performed pursuant to this agreement by either Licensee or Licensor so that Licensor may make suitable arrangements to have its representative or representatives present when such work is performed, or to perform the work itself if such is the case;

(b) remove promptly from manholes in which Licensee is performing work, any and all combustible materials, such as paper and oily rags, and upon completion of work in any manhole or hand hole, Licensee shall remove promptly all used litter and refuse deposited therein in connection with the work;

(c) permanently identify, by tags or other suitable means in each manhole or hand hole, all of its said equipment placed in said conduit system; and

(d) pay Licensor upon demand for all of Licensor's charges for performing work necessary to comply with the provisions of this agreement.

5. Licensee shall not

(a) perform any work in said conduit system pursuant to this agreement until and unless Licensor's representative is present at the site of such work;

(b) perform any work which, under this agreement, is to be performed by Licensor;

(c) permit any person to smoke or use any open flame in any manhole;

(d) permit the presence in any manhole of any spark-producing tools or equipment of any kind or nature including, but not limited to, meggers, breakdown sets, electric drills, electric hammers and induction sets; and

(e) install or permit to be installed in any part of said conduit system any electric supply circuits to operate any of said equipment except such supply circuits as may be an integral part of a cable of Licensee which Licensor has given Licensee permission to place in said conduit system.

6. Licensee's cables bound or wrapped with cloth or having any kind of fibrous covering or impregnated with an adhesive material shall not be permitted in Licensor's ducts.

7. The maximum permissible diameter of any cable of Licensee and the number of cables of Licensee to be placed in any of Licensor's ducts shall be determined by the Licensor based upon the size and shape of the duct and the size of any existing cable in the duct.

8. Where Licensee's duct physically connects with Licensor's manhole, the section of duct which connects with the manhole shall be installed by Licensor at Licensee's expense.

9. If Licensee constructs a duct which connects to any of Licensor's manholes, such duct shall be sealed against the entry of gases or liquids at the opening to the

manhole, and if the Licensee's duct enters a building, it shall be sealed at the entry to the building.

10. Clearing obstructions, repairs, dig-ups and any other work required to make a duct usable for the initial placing of Licensee's cable shall be done by the Licensor at Licensee's expense.

11. Any leak detection liquid or device used by Licensee's agents, employees or contractors shall be of a type approved by Licensor.

12. All of Licensee's cables, equipment and facilities shall be firmly secured and supported to the satisfaction of Licensor's authorized representative.

13. Licensee's employees, agents or contractors shall not use work platforms, supports or planks which would be placed upon or lashed to any of Licensor's cable or equipment.

14. In cases of emergency, Licensor shall have the right, without incurring any liability, to remove said equipment of Licensee from any part or parts of said conduit system at the sole risk and expense of Licensee. As soon as practicable thereafter Licensor will endeavor to make arrangements for the relocation or restoration of Licensee's equipment in said conduit system at Licensee's sole risk and expense. Licensee shall pay Licensor upon demand for Licensor's charges for such removal, relocation or restoration.

15. Assignment of duct space for Licensee's cable shall be the sole responsibility of Licensor.

(LOGO) Pacific Telephone

CF 0040 (2-78)
Ref. BSP 001-310-110PT

Certificate Of Workers' Compensation Insurance

This is to certify that:

_____

Insurance Company

_____

Home Office and State of Incorporation

is fully qualified to do insurance business in the State of California and has issued a valid Workers' Compensation insurance policy in a form approved by the California Insurance Commissioner to the employer named below for the policy period indicated.

Employer:	Effective Date	Expiration Date
_____	_____	_____
Name		
_____	Policy No: _____	
Address		

We shall give the Pacific Telephone and Telegraph Company 30 days' advance written notice should this policy be cancelled prior to its normal expiration, such notice to be given by certified mail, marked to the attention of:

_____ at _____

Date: _____ _____

Insurance Company

By _____

_____

Amount $ _____ Bond No. _____

FAITHFUL PERFORMANCE BOND
(In Duplicate)
Covering Pole Attachment/Conduit Agreement

KNOW ALL MEN BY THESE PRESENTS:

THAT we, _____, a corporation incorporated under the laws of the State of _____, as Principal, and _____, a corporation incorporated under the laws of the State of _____, and duly authorized to transact business in the State of _____, as Surety, are held and firmly bound unto The Pacific Telephone and Telegraph Company, a corporation incorporated under the laws of the State of California, hereinafter called "Telephone Company," in the sum of _____ dollars ($ _____), lawful money of the United States of America, to be paid to said Telephone Company, its successors and assigns, for which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the above bounden Principal has entered into or is about to enter into a written agreement with said Telephone Company, dated _____, 19___, setting forth the terms and conditions which shall govern Principal's use of such outside plant located in or near _____ in which Telephone Company has an ownership or other interest as Telephone Company may, upon application, permit Principal to use in the conduct of its business of furnishing communication services, which written agreement is hereby specifically referred to and made a part hereof, with like force and effect as if herein at length set forth;

NOW, THEREFORE, the condition of the above obligation is such that if the above-named Principal, its successors or assigns, does, and shall well and truly observe, perform, fulfill and keep its obligations to make the payments provided for in paragraphs numbered 4, 6, 12, 15 and 20 of said written agreement, to pay the premiums for the insurance provided for in paragraph numbered 17 thereof, and to remove or to pay for the removal of its equipment from said outside plant, or any of it, if said written agreement should be terminated in whole or in part pursuant to paragraph numbered 19 or paragraph numbered 25 thereof, then the above obligation to be void; otherwise to remain in full force and effect. Surety hereby agrees that Exhibit A attached to said written agreement may from time to time be modified, amended and supplemented in any manner by the Telephone Company and Principal without the consent of or notice to Surety and no such modification, amendment or supplement shall release, affect or impair Surety's obligation under this Faithful Performance Bond.

This bond shall take effect as of _____ and, unless terminated or cancelled in the manner hereinafter provided, shall remain in full force and effect during the life of said written agreement.

This bond is subject, however, to the following Express Conditions:

First: That in the event of a default on the part of Principal, its successors or assigns, in observing, performing, fulfilling and keeping the terms and provisions of said written agreement as aforesaid, a written statement of such default with full details thereof shall be given to Surety promptly and, in any event, within thirty (30) days after Telephone Company shall learn of such default, such notice to be delivered personally or by mail to Surety at _____.

Second: That no claim, suit or action under this bond by reason of any such default shall be brought against Surety unless asserted or commenced within twenty-four (24) months after the effective day of any termination or cancellation of this bond.

Third: That this bond may be terminated or cancelled by Surety by ninety (90) days' prior notice in writing from Surety to Principal and to Telephone Company, such notice to be given by certified mail and addressed as follows:

To Principal:

_____

_____

_____

_____

To Telephone Company:

_____

_____

_____

_____

Such termination or cancellation shall not affect any liability incurred or accrued under this bond prior to the effective date of such termination or cancellation.

Fourth: That no right of action shall accrue under this bond to or for the use of any person other than the Obligee hereunder, namely, Telephone Company, and its successors and assigns.

IN WITNESS WHEREOF, the above bounden Principal and the above bounden Surety have hereunto set their hands and seals, all on the _____ day of _____, 19___.

_____

By _____

and _____

Principal

_____

By _____

and _____

Surety

_____

FARROW, SCHILDHAUSE & WILSON
Including A Professional Corporation
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Robert M. Bramson
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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PREFERRED COMMUNICATIONS, INC., a California corporation, Plaintiff, v. CITY OF LOS ANGELES, CALIFORNIA, a municipal corporation, and DEPARTMENT OF WATER AND POWER, a municipal utility, Defendants.	NO. 83 5846 CBM (Bx) DECLARATION OF WILLARD A. HARGAN IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT Date: September 26, 1988 Time: 10:00 a.m. Courtroom: 11 (Filed Sep. 6, 1988)

I, Willard A. Hargan, declare: For the past twenty-five years I have been involved in various aspects of the cable television industry including installation, construction, operation, administration and ownership. I have also served as a Director and President of the California Cable Television Association (CCTA) and for the past fifteen years have chaired its Utility Relations Committee. During the course of my experience related to cable television system construction and operation, and activities of the CCTA Utility Relations Committee I became extremely familiar with cable television engineering, design and construction standards relative to utility company requirements and practices, as well as regulatory provisions related to installation of cable television facilities on utility company poles.

2. From 1961 to 1967 as Vice President of Technical Operations for Central California Communications Corporation, I was directly responsible for development, construction and operations of a number of cable television systems in Monterey, Santa Cruz and San Luis Obispo Counties. During the development phase I established engineering, design and construction standards, including procedures for preparation of pole attachment applications and developed a working relationship with the local utility companies, Pacific Telephone and Pacific Gas & Electric Companies. A part of the work with utility companies included field inspections with their personnel to determine utility rearrangement alternatives, e.g. cable arm placement, pole placement or change of cable television route. As a result I became well informed as to utility company procedures and practices relative to installation of cable television facilities on their poles.

3. In 1967 I assumed the position as President of Comac Signal Corporation, a California based contractor in construction and installation of cable television systems. I held that position from 1967 to 1970. During that period I directed all administrative and field activities for installation and construction of approximately 2,000 miles of cable television plant in California and Idaho. Although a portion of the plant was installed underground, at least 95% was installed on existing utility poles owned by various telephone and electrical utility companies.

4. In 1970, I established my own company which included a contracting division for engineering, construction and installation of cable television plant. Engineering activities included strand mapping and pole line engineering. Pole line engineering was performed in accordance with published utility company practices and provisions of General Order 95 of the California Public Utilities Commission. General Order 95 sets forth safety requirements and regulations for overhead line construction. (General Order 128 does the same for underground construction and installations.) Pole line engineering consisted of collection of field data showing location of poles and attachments thereto of hardware, telephone cable and power lines. This data was then summarized, formatted and submitted to the appropriate utility company along with required changes, if any, to existing utility company plant in order to accommodate the installation of proposed cable television facilities. The above described work was performed at various locations in California and included operating territories of Pacific

Telephone, General Telephone, Pacific Gas & Electric and Southern California Edison.

5. As Chairman of the CCTA Utility Relations Committe [sic], I represented California cable television companies in negotiations with utility companies for access to utility poles. A major project undertaken with the Pacific Telephone Company (Pacific) was the establishment of definitive guidelines for administration of pole attachment agreements and standard construction procedures. The result was the Pacific Manual of Construction Procedures and Agreement Administrative Guide known as the "Blue Book". A copy of the relevant portions of the current version of that Guide is filed with this declaration as Exhibit 1. I was also involved in a legislative effort which culminated in an addition to California Public Utilities Code §767.5 guarantying [sic] cable television companies continued use of surplus space on utility poles. It also provides that if surplus space does not exist, it can be made available by replacement of poles or by rearrangement of the existing utility plant so long as the cable television company bears the cost of such replacement and/or rearrangements.

6. My review of a number of utility pole attachment agreements, the "Blue Book" and Public Utilities Code sections relative to overhead line construction reveals no prohibition against installation of more than one cable television facilities on the same poles so long as surplus space is or can be made available and appropriate safety rules and regulations are observed. In fact, the "Blue Book" sets out detailed procedures for processing applications from multiple applicants whether the intended use if [sic] for the same or different poles. See Exhibit 1 at

pp. §2, pp. 10-13. Provision is also made for two or more users to install their respective cable on a common supporting messenger. Although Pacific has established and published more detailed administrative and installation information for cable television's use of communication space owned or controlled by Pacific than any other utility company, my experience has shown that similar agreements and procedures are followed by other pole owning utilities and that access to their poles for cable television is assured by §767.5 of the Public Utitlies [sic] Code. Also the number of wires or cables which may be attached to poles or other aerial support structures is limited only by the Public Utilities Commission's General Order 95. Accordingly, adequate suplus [sic] space is or can be made available for installation of multiple cable television facilities on overhead support structures in California. As for undergounding [sic], there is normally unlimited space for additional conduit.

7. In this connection, I should add that when any particular existing pole does not provide adequate "surplus" space for use by a cable television company or customer, "rearrangement" procedures have been worked out, and are available to replace such a pole with a taller pole. Utility poles come in five foot increments. Thus, any pole replacement would automatically provide new "surplus" space for at least four new cable television customers. (A foot or less of the additional five feet would be added to that portion of the pole placed in the ground for support purposes.)

8. Essentially, utility poles in California are maintained (as directed by the California Public Utility Code

pursuant to General Order No. 95) such that communications facilities, including cable television cables, occupy the space below that reserved for power lines. General Order No. 95 sets forth the minimum clearance requirements between cables, located in power space, communication space, and from the lowest communications cable to street level. Therefore, whenever a pole is jointly occupied by a power user (e.g., PG&E or the LADWP) and a communication user (e.g., Pacific Bell), the cable company will apply to the latter for pole attachment. If Pacific Bell is a joint owner or joint user of a utility pole with PG&E or a municipal power company, all cable television applications for jointly owned and for solely owned telephone company poles are submitted to Pacific Bell.

9. If a utility pole is only occupied and therefore solely owned by the electric utility, cable television pole attachment service applications are usually submitted directly to the power company, though the telephone company could and sometimes has purchased an interest in the solely owned power pole, at the expense of the cable company, and then provided that space to the cable company at an annual charge. This is the process often used when telephone utilities purchase additional space on an existing joint pole for use in providing pole attachment service to cable companies.

10. The general configuration of a utility pole in joint use by electric and telephone utilities, including cable television system facilities, is controlled by General Order No. 95. The electric "supply" system conductors must be installed at the top of the poles, with the highest voltage conductors located at the uppermost level. Lower

voltage conductors are installed at a lower level, separated from the upper conductors by the amount of clearance space required by General Order No. 95. A street lighting system might be installed at a level between the primary and secondary electrical distribution system conductors. A traffic control lighting system might also be installed on the poles at one of the lower electrical supply levels on the pole. There would then be a safety clearance on the poles between the electrical supply system at the upper levels of the poles, and the "communication space" at the lower levels of the poles. The amount of clearance between the electrical "supply" conductors and the communications space would depend upon the amplitude of voltage that is carried by the lowest level of the electrical supply system.

11. The quantity of wires which may be attached to poles, whether power, telephone cable, oil company, alarm company, and any other user, as well as the safety of all such wire line construction (including all applicable standards and practices) is regulated by the California Public Utilities Commission pursuant to California Public Utilities Code Section 761, 762 and 762.5. Further, pursuant to the standard pole attachment agreement, cable television companies are also subject to effective and rigorous oversight by the various utilities to ensure compliance with the Public Utilities Commission's safety standards for construction and maintenance of overhead as well as underground facilities.

12. The number of wires or cables to be attached to any aerial structure is limited only by the safety provisions of General Order 95 and the provisions of §762.5 of the Public Utility Code. These limitations apply to all

wires or cables whether they be the wires or cable of power companies, telephone companies – whether long distance or local, telegraph companies, alarm companies, cable television companies, oil companies, railroads, or foreign attachments (companies selling or leasing non-Bell telephone station devices). All of the above kinds of pole attachments now exist; and in some instances, such as cable television, more than one such company is attached to the same poles.

13. The amount of communications space available on the pole is determined by the amount of space between the bottom of the required safety space, and the minimum attachment level that is necessary to maintain the required clearance between the lowest conductor and ground. Several crossarms with open telephone wires installed on individual pin insulators may be installed within the communiations [sic] space. One or more telephone cables supported by messenger cable may be installed by direct attachment to the pole, or several cables and messengers may be installed on one or more crossarms. (The term "messenger cable" refers to a small cable composed of twisted multiple steel wires, which is used to support the main communications cables.) Cable television systems may be installed above the telephone utility cables, depending upon the location of the telephone conductors within the communications space. One or more cable television system cables supported by messenger cables may be installed by direct attachment to the utility pole, or they may be supported on crossarms or brackets.

14. There is a minimum amount of clearance between the lowest communication system cables or conductors, and the ground or buildings and other structures over which conductors may pass, depending upon the specific nature of the situatuon [sic] of the crossing, all of which is spelled out by rules contained in General Order No. 95. In order to maintain the required normal ground clearance of 18 feet at the center of a span between poles, it may be necessary to attach the lowest communications cable to the pole at the 20 foot level. Other ground clearances are designated for special circumstances, as stated above.

15. Section 84.4 of General Order No. 95, contains the clearance requirement for communications lines under specific circumstances described in the order. An obvious concern on any pole is the minimum clearance space required between different communications conductors. Rule 38, Table 2, contains these requirements.

16. In the situation involving the joint use of poles and the communications space by one or more cable television systems and a telephone utility, as well as other communications systems, no clearance is required. See Rule 87.4-C (Between Conductors and Cables) and in Rule 38, Table 2 (see also, Rule 32.3D) with specified modifications. Therefore, insulated communications cables may be installed as close together as may be practicable. As a matter of fact, the minimum clearance between communications cable may be dictated only by the amount of space required for the equipment used to lash the communications cable to its supporting messenger.

17. At the request of Harold R. Farrow of the law firm of Farrow, Schildhause & Wilson, I inspected in October, 1986, representative sections of existing pole lines in the area of Los Angeles County shown on the map filed with this declaraton [sic] as Exhibit 2. The purpose of the inspection was to report my opinion and conclusions as to whether surplus space was available or could be made available for the installation of one or more cable television systems. In order to depict the condition of existing poles I took a series of photographs, filed with this declaration as Exhibit 4, which are a fair representation of various situations encountered throughout the area of inspection.

(a) Photo No. 1 shows a street side easement on Colden Avenue between San Pedro Street and Broadway. It is readily apparent that adequate surplus space exists for the installation of multiple cable television facilities since there are only power lines on the poles and the cable could be placed six feet below those lines without a guard arm.

(b) Photo No. 2 shows an alley easement east of Broadway in the southeast section of the area shown on Exhibit 2. It is apparent that adequate surplus space exists between the telephone lines below and the power lines above without a requirement for rearrangement of either telephone or power facilities.

(c) Photo No. 3 shows a rear easement west of Wall Street between 87th and 88th Streets. Adequate surplus space exists on this pole with no requirements for rearrangement of either telephone or power facilities. There is approximately 10 feet of unobstructed pole

space between an existing telephone company guard arm and the power company crossarm. The amount of space is readily discernable by observing the three existing pole steps at 36 inch intervals on the same side of the pole.

(d) Photo No. 4 shows an alley easement between Brighton and Halldale Avenues north of Manchester Blvd. Except for relocation of some telephone drop wires and an associated wooden support arm placed parallel to the alley (note the fourth pole in the lead) adequate surplus space is available without rearrangment [sic] of telephone or power facilities.

(e) Photo No. 5 shows a street front easement on Normandie Avenue between King Blvd. and 39th Street. The poles shown here are solely owned telephone poles without power lines. In this case multiple cable facilities may be installed above existing telephone cables.

(f) Photo No. 6 shows a street front easement on Normandie Avenue between 35th and 39th Streets. Adequate surplus space exists for installation of multiple cable television facilities since, again, there are only power lines at the uppermost portion of the poles.

(g) Photo No. 7 shows a street front easement on 79th Street east of Broadway. Adequate surplus space exists for installation of multiple cable television facilities, for the reasons pointed out with respect to Photo No. 6.

(h) Photo No. 8 shows a street front easement on Grammercy Place between the Santa Monica Freeway and 26th Street. Adequate surplus space is available for installation of multiple cable television facilities because there are

only power lines at the uppermost portion of the poles and, with the possible exception of tree trimming, no make ready work would be necessary.

(i) Photo No. 9 shows an alley easement between 24th and 25th Streets from Grammercy Place to Arlington Avenue. Adequate surplus space is available for installation of multiple cable television facilities because there are only power lines at the uppermost portion of the poles.

(j) Photo No. 10 shows an alley easement east of Broadway north of Manchester Blvd. Adequate surplus space is available for installation of multiple cable television facilities on either the power or the telephone poles located on opposite sides of the alley.

In addition to the photographs described above, a series of photographs were taken of representative sections of utility poles to which an operating cable company, CommuniCom, Inc., had attached its own cable television facilities. This area is depicted in Exhibit 3 filed with this declaration, which is contiguous to the area shown in Exhibit 2. The purpose of these photos is to demonstrate the surplus space still available for installation of additional cable television facilities.

(a) Photo No. 11 shows a street side easement on Washington Avenue between Budlong and Western Avenues. An existing cable television plant has been attached to power poles on the left side of the street well below the power plant above. Adequate surplus space is available above the existing plant for installation of other cable television facilities.

(b) Photo No. 12 shows a street side easement on Venice Blvd. between Rimpau Blvd. and Ardmore Avenue with an existing cable television plant in place on power poles with a fire alarm circuit. Other cable television facilities can be installed above the existing cable plant by raising the fire alarm circuits (i.e., the lowest cross arms) in order to maintain required clearances. An optional method would be to install a cable arm and relocate the existing plant to one end of the arm and the new plant to the other. Photo No. 13, which depicts such an arrangement shows one end of a cable arm vacant.

(c) Photo No. 14 shows an easement off Rimpau Blvd. with power, cable television and telephone occupying the same pole. Adequate surplus space is available to install additional cable television facilities above the existing cable plant and below the power lines. The only rearrangement required would be to raise the existing drop arm or, as an alternative, install a cable arm and relocate the existing cable plant to one end of the arm and a new facility to the other.

(d) Photo No. 15 shows a street front easement on 9th Street between Kenmore Avenue and Hobart Blvd. where power, fire alarm and cable television occupy the same poles. Adequate surplus space is available between the existing cable television plant and the fire alarm circuits (i.e., the lowest cross arms). No rearrangements would be necessary.

(e) Photo No. 16 shows a street front easement on Council Street between Edgemont

Street and Normandie Avenue. Adequate surplus space is available for installation of additional cable television facilities. The only rearrangement necessary would be to relocate the communications guard arm on the second pole to a position above the additional cable when it was installed.

(f) Photo No. 17 shows a rear easement between Normandie and Mariposa Avenues at First Street. This is typical of rear easements in the area. Options for installation of additional cable television facilities include vertical separation or installation of a cable arm with existing plant relocated to one end of the arm and the additional cable television facility to the other.

The availability of surplus space on utility poles at specific locations above described and depicted in the accompanying photographs in Exhibit 4 is representative of the areas which I inspected. As indicated earlier those areas are shown in Exhibits 2 and 3.

18. In July, 1988, I made a second servey [sic] to inspect the area for possible headend sites and to inspect areas (shown in Exhibit 2) where cable had been installed since the 1986 survey. The photographs which follow (also in Exhibit 4) fairly represent typical situations which I found during this second survey.

(a) Photo No. 18 shows Adams street, facing west, between 2227 and 2261. It shows power poles without communications attachments which are suitable for a trunk line from a headend were one to be located at the corner of Crenshaw and Adams.

(b) Photo No. 19 is a pole south of 79th Street in an alley east of Broadway. It has an existing cable plant six feet below the power plant and immediately above the arm, with communications plant immediately below the arm. To add a second cable these rearrangements would be required: the street light would be moved up, and a guard arm would [sic] installed (General Order No. 95 requires a guard arm if cable is closer than 6 feet to the power plant), and the new cable plant installed one foot above the existing cable plant. Alternatively, a longer pole, which would add about four additional feet of usuable [sic] "surplus" space, could be subsituted [sic] for the existing pole.

(c) Photo No. 20 is a pole south of 80th Street in an alley. It shows the power plant at the top, a guard arm with the cable plant immediately below, then a drop arm for telephone, and finally, two telephone cables. To add a second television cable plant would require that the guard arm be raised one foot, and the new cable plant be installed below the guard arm one foot above the existing cable plant.

(d) Photos Nos. 21 and 22 were taken in an alley at the corner of 81st Street. No. 21 is a wholly owned telephone pole. The existing cable plant is at the top of the pole, below which are two telephone cables. There is a two foot separation between the cable plant and the higher telephone cable. To add a second cable plant would require that the existing cable plant be lowered one foot and the new cable plant would then take the position presently occupied by the existing cable plant. No. 22 shows the

down guy wire for the cable system attached to an existing phone anchor.

(e) Photo No. 23 is at 8703 Wall Street. This illustrates the fact the the Department of Water and Power permits (as authorized by General Order No. 95) the placement of cable plant closer than six feet to the power plant when a guard arm is installed between the cable system and the power lines.

(f) Photo No. 24 is of the same pole depicted in Photo No. 3 after installation of a cable plant. Despite that fact, there still is some 9 feet of space for installation of a second cable plant above the existing cable plant.

(g) Photos Nos. 25, 26, 27 and 28 are eastern, western, northern and southern views, respectively, of the intersection of 83rd Street and Budlong. They show adequate space for installation of a second cable system without any need for rearrangements except in No. 26, which would require the lowering of the existing cable plant one foot to accomadate [sic] the additional cable plant.

My second survey reaffirmed my professional opinion that, while rearrangements would often be required, including the possibility of substituting a new pole in one instance, adequate surplus space exists in the areas examined for an additional cable system despite the fact that an existing cable system is already on the poles.

19. As to undergrounding, technology available for underground construction similarly minimizes any potential inconvenience caused by the introduction of multiple cable television systems. This is required where

the existing utility plant is underground, and is sometimes chosen by cable companies as being less expensive than paying for utility company rearrangements. The "trenching" process, pursuant to which cable is initially placed underground, utilizes what is known as a "rock-wheel." A rock-wheel is a pavement cutting device which makes approximately a 6 inch wide trench in the pavement to any desired depth. The trench must be a minimum of 18 inches deep as per the requirements of General Order No. 128. Locally issued permits are routinely issued subject only to conditions to insure pavement repair and traffic handling. The process for the installation of underground cables is essentially one operation in which the pavement is cut, conduit and cable inserted, and the trench backfilled. An alternative procedure is to place conduit without cable and subsequently pull the cable into the conduit after the backfilling operation has been completed. The backfill is slurry (cement) poured to the entire depth, width and length of the trench. Usually, an area of approximately 1" to 3" is left unfilled in order to place an asphalt cap, which, when in place, completes the operation. Such trenching and slurry backfill can be accomplished with a mimimum [sic] of noise, dirt, and other inconvenience. The operation is so rapid that the trenching, placement of conduit and backfill pour can be completed in one block in less than four hours. The significance of the technology available for cable television trenching, and of the rapidity with which the process is completed compares quite favorably with other municipal processes which disturb the public rights of way. (See Exhibit 5, pp. 47-48, filed with this declaration.)

20. There are, of course, several other processes available to minimize disruption of the public rights-of-way, such as "pit boring" technology, whereby a pit is dug on either side of a busy street or intersection and a subterranean "trench" is bored through which the cable can then be easily threaded. Such a procedure obviously eliminates unnecessary traffic disruption.

21. Based on 25 years experience in the cable television industry which included installation and operation of cable television systems in a number of geographic areas in California and my inspection of utility poles in the above referenced areas of Los Angeles County, it is my professional opinion that adequate surplus space is or can be made available for installation, maintenance and operation of multiple cable television systems. The presence of cable television cables, whether single or multiple, will place no significant additional burden on existing utility poles, the public utility companies or on public rights-of-way in any of the areas inspected. I have also reviewed the Atherton-Menlo Park-Palo Alto Joint Cable Study (Exhibit 5), which was supplied me, and am in professional agreement with the conclusions in that report insofar as they relate to pole attachment and undergrounding practices regarding cable television contruction [sic] and installations. There is, therefore, in my professional opinion, no physical scarcity which could justify limiting access to a single cable television system, particularly since the poles in Los Angeles average the height of 45 feet, which is 5 feet taller than poles typically used in urban areas.

I declare under penalty of perjury, that the foregoing statements are true and correct, and that this declaration

was executed on September 1, 1988, at Sacramento, California.

/s/ Willard A. Hargan
Willard A. Hargan

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IN THE UNITED STATES DISTRICT COURT
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PREFERRED COMMUNICATIONS, INC., a California corporation, Plaintiff, v. CITY OF LOS ANGELES, CALIFORNIA a municipal corporation, and DEPARTMENT OF WATER AND POWER, a municipal utility, Defendants.	NO. 83 5846 CBM (Bx) SECOND SUPPLEMENTAL DECLARATION OF WILLARD A. HARGAN IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT Date: November 27, 1989 Time: 10:00 a.m. Courtroom: 11 (Filed Oct. 2, 1989)

I, Willard A. Hargan, do declare as follows:

1. This second supplemental declaration is submitted in opposition to the motions for summary judgment filed by defendants in the above-captioned action. Earlier declarations made by me were filed with the Court on September 6 and November 7, 1988. The facts stated herein are true and correct of my own knowledge, except as to those facts which are stated on information and belief, as to which I believe them to be true. I am fully competent to testify to the following facts, and if called as a witness at trial could testify to them.

2. In my previous declarations, I have already expressed my professional opinion that there is no physical reason why multiple cable television systems could not be accommodated on utility poles in the South Central and Hollywood/Wilshire areas. This continues to be my opinion.

3. I have reviewed the supplemental declaration of Mitchell Kolacinski.

4. Mr. Kolacinski states that he has reviewed some of my work in this case, and expresses the opinion that approximately 40% more "make-ready" work would be needed to accommodate a second system on the existing poles than I found in my work. As there is no specific detail relating to specific poles set forth by Mr. Kolacinski, I cannot comment further on his opinion. However, even if I agree fully with the 40% figure, it would not alter my opinion that there is no physical reason why a second system cannot be accommodated.

5. Mr. Kolacinski states that "the placement of a second cable system in that area [South Central] will

completely saturate the poles, . . . " I dispute that statement, just as I disputed the claim that one cable system saturated the poles. Multiple additional wires (particularly communications wires, which do not pose any electrical hazard) can be added to utility poles through make-ready rearrangement work pursuant to public utility commission standards. Indeed, Mr. Kolacinski himself admits this fact in paragraph 29 of his supplemental declaration. In my opinion, it is no more accurate to say that a second cable television system would "exhaust" space on the poles, than that the first system did so, or that a third or fourth system would do so.

6. In his second declaration, Mr. Kolacinski does not specify precisely how many poles he contends would have to be replaced to accommodate an additional set of wires for a second system. However, in his first declaration, he argued that 40%-50% of all utility poles would have to be replaced by Preferred Communications in placing its set of wires. Assuming this to be true (and I certainly disagree with it), this would result in the *creation* of much additional open space on the replaced poles, since poles come in 5-foot increments which add four feet of usable space upon replacement. (One foot of space is not usable, because the taller pole must be placed one foot deeper underground.) Since, under that scenario, Preferred would be required to pay the entire cost of the new pole, DWP and Pacific Bell would actually *benefit* from ownership of a larger, newer pole paid for by Preferred, which would provide them with inexpensive, available space to expand, should the same actually ever be necessary. (Even though the cable television company requiring a larger pole has to bear the cost of that pole,

ownership remains in the hands of the utilities.) Thus, if Mr. Kolacinski is correct and Preferred's system requires replacement at its expense of 50% of all utility poles, at a minimum, *that* 50% of the poles would have plenty of available space for utility expansion.

7. Mr. Kolacinski is also incorrect in his assertion that the utilities would bear the costs of pole replacement if utility expansion became necessary in the future and no pole space was available due to use of space by cable television companies. Both the state statute, Cal. Pub. Util. Code §767.5 and the pole attachment contracts of DWP and Pacific Bell which cable companies sign, require that the *cable company* pay for any necessary replacements or rearrangements which are necessitated solely by the cable company's continuing attachment to the poles. In other words, if space on the utility pole is needed by either of the utilities, the cable company must either vacate the pole or pay whatever additional rearrangement cost is necessitated by continued use of the pole. I am personally aware of many instances where utilities charged cable companies in California for pole replacements in such circumstances.

8. I also disagree with Mr. Kolacinski's statement that the installation of a second cable system would cause substantial safety risks. All safety standards applicable to the attachment of communications cables on utility poles are set forth in general orders of the California Public Utilities Commission. Such work has been safely accomplished for many years in California, and indeed throughout the country. While it is possible, as is true in any large project, that individuals may fail to properly

comply with those safety standards, there is an established system of inspection by both Pacific Bell and DWP designed for early detection of any such occasional violations. Construction standards require that dangerous violations be remedied immediately upon detection. Obviously, if Pacific Bell or DWP legitimately thought that cable installation was unreasonably dangerous, they would not have permitted such installation throughout the City of Los Angeles (and in Pacific Bell's case, throughout its operating territory). It should also be noted that work on poles is most often done by use of a "bucket truck" (or "cherry picker" as it is sometimes called), rather than by climbing the pole.

9. In my opinion, the suggestion that the installation of a second cable television system would increase the likelihood of safety hazards is like saying that the registration of an additional automobile by the Department of Motor Vehicles increases the likelihood of safety hazards on our roads.

10. Cable television systems can increase their total channel capacity in two different ways. First, the electronic devices used to amplify the electronic signal along the cable can be spaced closer together to permit increased channel capacity over a single cable, so long as the electronic equipment at the cable system's signal origination point (called the "head end") also uses the necessary electronics to provide such signal capacity. If a cable operator has all available channels filled with programming, and wishes to carry an additional programming service, it must either replace an existing service with a new one or incur the substantial expenditures to increase

the channel capacity of the system as a whole. For example, in a 36 channel capacity system, it is generally not practical or feasible to attempt to expand to 37 or 38 channels. Instead, an entire "electronic rebuild" would ordinarily be necessary.

11. The second way a cable operator can increase its channel capacity is to use two separate cables to transmit its programming. This, in essence, doubles its channel capacity. However, this requires a very expensive capital investment, since material prices are doubled and labor prices for installing the cable are increased significantly.

12. Both of these methods of increasing channel capacity not only take substantial capital investment, they also increase the ongoing operating costs of the system, due to increased power and repair costs. The increased capital costs alone for constructing a 54 channel system as opposed to a 36 channel system for an area the size of South Central Los Angeles, I would estimate to be as much as $1,250,000. That estimate assumes the less expensive manner of expanding channel capacity (*i.e.* without use of two cables).

13. I estimate the extra cost required to construct a 54 channel system of the size necessary to cover the South Central Los Angeles area with two-way capability, as opposed to a 54 channel system of similar size without that capability, would be between 6% and 7% increase in capital cost. This percentage equals approximately $1,000,000.

14. As I stated in my first supplemental declaration, I projected costs and revenues for a cable television system engaged in head-to-head competition of approximately the size necessary to cover the South Central Los Angeles area. My conclusion was that competition between two cable television companies in the relevant area is economically viable. According to my projections, PCI would make a profit in such an operation. Since I assumed that PCI would evenly split the total number of customers with its competitor, this implies that two cable television companies with similar expenses would both make a profit. This is particularly evident if one assumes that either or both companies can operate without expensive regulatory burdens imposed upon them by the City of Los Angeles.

I declare the above to be true and correct under penalty of perjury.

Dated: October 13, 1989 /s/ Willard A. Hargan
Willard A. Hargan

Supreme Court, U.S.
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No. 93-1570

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PREFERRED COMMUNICATIONS, INC.,
Petitioner,

v.

CITY OF LOS ANGELES and DEPARTMENT OF WATER AND POWER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Contrary to Petitioner's assertion, the evidence below showed that the construction and operation of a cable television system requires the installation and maintenance of hundreds of miles of cable plant and wires traversing over and under public streets and rights-of-way held in fee or easement by Respondents. The question presented, therefore, should be phrased as follows:

1. In light of the fact that a cable television system inherently involves the ongoing, non-transient use of municipal streets and rights-of-way, may a municipality, consistent with the First Amendment, condition use by cable operators of city property through the same franchise process that it has uniformly and historically applied to all similarly-situated users of its streets and rights-of-way?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1570

PREFERRED COMMUNICATIONS, INC.,
Petitioner,

v.

CITY OF LOS ANGELES and DEPARTMENT OF WATER AND POWER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Respondents incorporate by reference the Opinions Below section in the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the court of appeals was entered January 7, 1994. The Petition for Writ of Certiorari was filed April 5, 1994. Preferred invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1), but Respondents contend that Preferred lacks standing, and that the courts below and this Court therefore lack jurisdiction. This contention is discussed in Respondents' Conditional Cross-Petition for Certiorari in No. 93-1759, filed pursuant to Rule 12.3 on May 5, 1994.

STATUTES INVOLVED

California Government Code §§ 53066 and 53066.3 are set forth in the Appendix at pages 1a-4a.

STATEMENT OF THE CASE

Respondents incorporate by reference the Statement of the Case in the Conditional Cross-Petition for Certiorari filed in No. 93-1759 on May 5, 1994.

REASONS FOR DENYING THE PETITION

It is undisputed that certain aspects of cable television, such as an operator's programming decisions, "plainly implicate First Amendment interests." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). *See also Leathers v. Medlock*, 499 U.S. 439, 450 (1991). Courts throughout the country are considering the appropriate balance between those interests and the "competing societal interests" embodied in municipal cable franchising. *Preferred*, 476 U.S. at 495. The Petition here, however, presents neither the questions nor the record for the Court to provide meaningful guidance on these difficult constitutional issues. The Petition should be denied for several independent reasons, each of which is discussed in further detail below:

1. On the questions presented by Petitioner, the decision does not conflict with any decision of this Court or any court of appeals. Indeed, Preferred does not contend otherwise.

2. The questions presented rest entirely on Petitioner's factual assumption that the wires and facilities of cable systems make no use of public streets or rights-of-way in which the City has a property interest (*e.g.*, Pet. at i, 3 & 24). In fact, the record below demonstrates just the opposite: Cable systems occupy hundreds of miles of public streets and rights-of-way held by the City in fee or through easements. In any event, the Court could not reach the constitutional issues posed by Petitioner without

first resolving this factual issue, which Preferred never squarely presented to the courts below.

3. The questions presented also depend on Petitioner's reading of Cal. Pub. Util. Code § 767.5, an interpretation that is clearly contradicted both by Cal. Pub. Util. Code § 767.5(a)(1), and by a provision of state law not cited by Preferred, Cal. Gov't Code § 53066. Indeed, Petitioner's reading of Cal. Pub. Util. Code § 767.5 was rejected by the only courts that have addressed the issue. *See* note 9 *infra*. In any event, the Court could not even reach the First Amendment issues presented without first ruling on the applicability of Section 767.5 to Los Angeles' Department of Water and Power ("DWP"), and the relationship of Cal. Pub. Util. Code § 767.5 and Cal. Gov't Code § 53066, purely state law questions squarely raised in this case for the first time in the Petition.

4. In remanding the case and directing Los Angeles to issue a Notice of Sale ("NOS") for an additional franchise, the court of appeals outlined five possible outcomes. Three of these scenarios would result in Preferred lacking standing; one would result in mootness. In only one of the five scenarios posited by the court of appeals would there possibly remain constitutional issues to be resolved. The court of appeals concluded that, under the particular circumstances of this case, "it would be precipitous of us to reach [these difficult constitutional issues] at this time." Pet. App. at A67.

5. Respondents contend that Preferred lacks standing for the reasons set forth in the Conditional Cross-Petition in No. 93-1579 at i, 10-14. At best, Preferred's standing is marginal, and prudential considerations suggest that a borderline case or controversy does not present a proper occasion for resolving complex constitutional questions.

6. The decision of the court of appeals is clearly correct insofar as the questions presented in the Petition are concerned.

DISCUSSION

In 1983 Preferred mounted a wholesale attack on every aspect of the City's cable franchising requirements. It did so despite the fact that it had never applied for a franchise. Perhaps more importantly, discovery conclusively revealed that Preferred lacked all indicia of being a bona fide business, much less one with the financial, technical, and managerial expertise that the record demonstrated was necessary to construct, operate and maintain what Preferred itself conceded would be a multimillion dollar cable system.

While the courts below held that these deficiencies did not deprive Preferred of standing, the deficiencies nevertheless have shaped the litigation and the record in a way that would make this case a very shaky foundation indeed on which to construct constitutional doctrine. The court of appeals recognized this, vacating most of the district court's rulings on the constitutionality of specific franchise requirements. Otherwise, the court concluded, "we would not escape the charge of rendering advisory opinions poorly disguised as sweeping dicta." Pet. App. A68 (citation omitted). This Court should heed the concerns expressed by the court of appeals, and deny the Petition.

1. *This Case Does Not Present A Conflict In The Circuits.* On the questions presented by Petitioner, the decision of the Ninth Circuit does not conflict with any decision of this Court or the courts of appeals.[1] To be

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[1] *Amici* United States Telephone Association and Bell Atlantic misleadingly attempt to create a conflict by referring to two courts of appeals decisions. Amicus Br. at 14 & n.13 (citing *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); and *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982)). But as even *amici's* description of those cases makes clear, each, at best, involved an issue arguably related only to the Conditional

sure, the circumstances under which the activities of cable television operators "implicate First Amendment interests" raise a variety of constitutional issues.[2] The lower courts have started to address these issues, but few cases have yet been decided by the courts of appeals. The Court should not attempt to address these constitutional questions until the courts of appeals have had more opportunities to consider the issues in different contexts.

Cross-Petition: The scope of a municipality's authority to limit the number of cable franchises granted. *None* of the cases cited addressed, much less conflicted with the decision below on, the question presented here: The constitutionality of the City's NOS process.

Moreover, *amici's* fixation with "exclusive" franchises leads them to mischaracterize both the record and the case law. Thus, *amici* assert that the City grants exclusive franchises; even Petitioner begrudgingly concedes that is not so. Pet. at 16. Similarly, they claim that the 1992 Cable Act "limited, but did not forbid, exclusive franchises" (Amicus Br. at 15), even though that Act explicitly prohibits exclusive franchises, 47 U.S.C. § 541(a)(1). Precedent cited by *amici* confirms this. *See Cox Cable Communications, Inc. v. United States*, 992 F.2d 1178 (11th Cir. 1993) (cited merely as subsequent history to district court decision in Amicus Br. at 13 n.12). Through this deceptive description of the current legal status of "exclusive" franchises, *amici* apparently seek to lure the Court into departing from its long-settled doctrine of refraining from addressing constitutional issues when it is not necessary to do so. *See Ashwander v. TVA*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

[2] Indeed, this Court has one such case pending. *See Turner Broadcasting System, Inc. v. Federal Communications Commission*, 819 F. Supp. 32 (D.D.C. 1993), *prob. juris. noted*, 62 U.S.L.W. 3241 (U.S. Sept. 28, 1993) (No. 93-44) (argued Jan. 12, 1994). *Amici's* suggestion (Amicus Br. at 2) that this case is a "logical successor" to *Turner*, however, is mystifying. Since this Court has not yet decided *Turner*, it is surely premature for *amici* to designate a "logical successor." Moreover, the court of appeals here has already directed the district court to take the Court's guidance in *Turner* into account on remand. *See* Pet. App. A68 n.7.

2. *The Court Would Have To Resolve A Factual Dispute Before Reaching The Constitutional Issues Since The Questions Presented Rest On A Factual Assumption Contradicted By The Record.* Each of the questions presented by Petitioner depends on the following factual assumption: Cable systems make no use of municipal rights-of-way or other property. *E.g.*, Pet. at i & 24. In fact, Respondents believe the uncontroverted record supports exactly the opposite conclusion. Because Preferred never squarely raised this issue below, however, neither the district court nor the court of appeals ever addressed what now appears to be a factual dispute. As a result, before the Court could even reach the constitutional issues, it would first have to review the evidence to determine ownership of the rights-of-way used by cable systems in Los Angeles. Such a factual inquiry would be directly contrary to the Court's stated position that it does not "grant certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925); *see also Texas v. Mead*, 465 U.S. 1041 (1984). Moreover, the Court will "refrain from addressing issues not raised in the Court of Appeals." *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). *See also, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 n.5 (1989); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).

The questions presented assume that the City of Los Angeles has no property interest in the rights-of-way on which cable operators place their wires and facilities. Preferred claims that the easements and rights-of-way belong to private utility companies (Pet. at 24), but not surprisingly offers no record support for this assertion.[3]

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[3] Indeed, on its face, the Pacific Telephone pole attachment agreement appended to the Petition contradicts Preferred's assertion. The agreement makes plain that it grants the user no rights to the underlying property, but instead requires the user to obtain such rights from property owners as a precondition to applying for pole attachment service. Pet. App. A203 at ¶ 9.

The record, in fact, makes abundantly clear that cable operators place their wires and facilities on utility poles located in public rights-of-way, or in underground conduit placed beneath public streets. *E.g.*, CR 445 at ¶¶ 5-8; CR 450 at ¶¶ 11-12; CR 452 at ¶ 6.[4] Such property is either held by the City in fee, or owned in fee by the abutting property owners with a permanent easement granted to the City for right-of-way purposes. CR 445. The property was obtained by the City either through negotiated settlements, eminent domain procedures, or was dedicated to the City pursuant to some form of subdivision approval process. *Id.*

Although Preferred never pursued this point below, and thus the opinions do not clearly address it, the courts below clearly understood that Los Angeles has an interest in the property used by cable operators. For example, the district court said:

> As with other franchisees, cable operators benefit from the use of public property, streets, rights-of-way, and easements. The City argues that, like other property owners, it has a legitimate interest in receiving adequate compensation for use of its property by private users. As the trustee of public property on behalf of its residents, the City has a special duty to see that the public receives adequate compensation for use of public property by private commercial enterprises, such as cable operators, who make ongoing and comprehensive use of public property for private gain.[5]

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[4] References to "CR" refer to the Clerk's Record in the courts below.

[5] In fact, the record here makes plain that the cable system Preferred says it wants to build would require the installation of approximately 700 miles of additional cable plant over and under City streets and rights-of-way. CR 174 at Exh. 11; CR 200 at ¶ 7. Thus, Petitioner's suggestion that it does not seek to use City streets and rights-of-way "any more or any differently" than "any other consumer of public utility services" (Pet. at 3) is sheer nonsense.

Pet. App. at A134; *see also* Pet. App. at A78, A87 & A115. Similarly, the court of appeals acknowledged that "cable systems place a strain on public resources: They disrupt traffic and take up public easements and rights of way." Pet. App. at A64. Indeed, this Court recognized that the very same property at issue here—Los Angeles' utility infrastructure—was public property in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 792-93 (1984) (upholding Los Angeles ordinance prohibiting the posting of signs on public property, including utility poles).

In order to reach the constitutional issues raised by Preferred, the Court would first have to determine the validity of Preferred's factual assertion by examining the nature of the City's property interests in the hundreds of miles of street and rights-of-way that Preferred lays claim to. While the City believes that the record and the case law are unambiguous on this point, the Court would nevertheless have to review the record to resolve what is, at best from Petitioner's standpoint, a disputed factual issue. This consideration, standing alone, is more than adequate reason to deny the Petition. *See United States v. Johnson*, 268 U.S. at 227.

3. *The Questions Presented Also Rest On Petitioner's Erroneous Reading Of State Law.* In addition to resting on controverted facts, the questions presented also rest on Preferred's erroneous interpretation of state law, specifically Cal. Pub. Util. Code § 767.5. According to Preferred, cable operators are mere consumers of common carrier pole attachment services under Section 767.5, entitled to make use of all underlying easements and property traversed by the utilities, thereby obviating the need for a cable operator to use municipal right-of-way.[6] Pet. at i, 6 & 24. This issue was also never squarely

[6] Even *amici* take issue with Preferred's characterization of pole attachments as a common carrier service. Amicus Br. at n.20.

presented to the courts below; therefore, neither the district court nor the court of appeals ruled on it.

The problem with Preferred's argument is that it rests on a doubly flawed reading of state law. First, on its face, Section 767.5 does not even apply to municipally owned utilities like the City's DWP. Cal. Gov't Code § 767.5(a)(1) (" 'Public utility' includes any person, firm, or corporation, *except a publicly owned public utility*") (emphasis added). Petitioner's heavy reliance on the regulatory authority of the California Public Utilities Commission ("PUC") is similarly misplaced. Pet. at 5 & 10. As California courts have made clear, the PUC has no jurisdiction over municipally owned utilities like DWP. *See County of Inyo v. Public Utilities Comm'n*, 26 Cal.3d 154, 178 (1980) (California legislature has not granted PUC jurisdiction over municipally owned utilities). Thus, as a matter of state law, Section 767.5 gives Petitioner no right whatsoever to attach to DWP's poles and conduits.[7]

Second, Petitioner completely ignores another provision of state law: Cal. Gov't Code § 53066. Among other things, Section 53066 provides that "No person may commence the construction of a cable television system without a franchise or license granted by the city . . . in which the cable television system will operate." Cal. Gov't Code § 53066(e). It further provides that a franchise awarded by a municipality "authorize[s] the grantee thereof to place wires, conduits and appurtenances for the community antenna television system along or across such public streets, highways, alleys, public properties, or public easements of said city . . . . Public easements . . . shall include . . . any easement created by dedication

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[7] *Amici* make a similar error, asserting that poles and conduits are not owned by municipalities, but "are *privately* owned by telephone companies and utilities." Amicus Br. at 16 & n.19 (emphasis in original). In fact, the City, through its DWP, *does* own utility poles and conduits. *E.g.*, CR 152 at ¶¶ 2-17; CR 445 at ¶ 5; CR 448 at ¶ 4.

to the city . . . for public utility purposes or any other purpose whatsoever." [8] Cal. Gov't Code § 53066(d).

In light of Section 53066, Cal. Pub. Util. Code § 767.5 must be construed as applying only to cable operators that have received the franchise required by Cal. Gov't Code § 53066. Petitioner's reading of Section 767.5, in contrast, would render Section 53066 a nullity, since according to Petitioner, any member of the public could obtain access to municipal rights-of-way simply by obtaining so-called "common carrier" pole attachment service under Section 767.5. Not surprising, courts have consistently rejected Petitioner's conclusion.[9]

The point here, however, is not whether the City's or Petitioner's interpretation of the nuances of California law is correct. The point is that in order even to reach the constitutional issues, the Court would first have to resolve the parties' disagreement about state law. That is not the proper role for the exercise of the Court's

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[8] Cal. Gov't Code § 53066.3 further provides that, in determining whether to grant additional cable franchises, a municipality must consider a variety of factors, including "[w]hether there will be an unreasonable disruption or inconvenience to existing users, or any adverse effect or future use, of utility poles, public easements, and the public rights-of-way contrary to the intent of Section 767.5 of the Public Utility Code." Petitioner does not explain how this companion state statute can be squared with its expansive reading of Section 767.5.

[9] *See Century Federal, Inc. v. City of Palo Alto*, 710 F. Supp. 1559, 1563-68 & 1574 n.28 (N.D. Cal. 1988); *Group W Cable, Inc. v. City of Santa Cruz*, 679 F. Supp. 977, 979 (N.D. Cal. 1988); *Pacific West Cable Co. v. City of Sacramento*, 672 F. Supp. 1322, 1333 (E.D. Cal. 1987). *Salvaty v. Falcon Cable Television*, 165 Cal. App. 3d 798 (1985), cited by Petitioner (Pet. at 6), is not to the contrary. *Salvaty* involves the apportionability of a *private* easement granted to a telephone company by a private land owner; it says nothing about access to municipally owned rights-of-way. *Id.* at 800-03. Moreover, *Salvaty* makes clear that the cable operator had already been awarded a franchise giving it access to public streets and rights-of-way. *Id.* at 800-01.

jurisdiction, and in and of itself, is reason to deny the Petition. *Cf. Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) (emphasizing that "a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review").

Moreover, since any decision by the Court on the issues presented would necessarily be limited in applicability to the specific circumstances of Cal. Pub. Util. Code § 767.5, such a decision would give little guidance to courts outside of California. This, too, is yet another reason to deny the Petition.

4. *On Remand Preferred May Lack Standing Or The Case May Become Moot.* There is a substantial likelihood that following the remand ordered by the court of appeals, this case will be resolved in a way that will moot the issues the Petition presents. Pet. App. A66-67. The court of appeals ordered Los Angeles to issue an NOS for South Central; Preferred will, of course, have an opportunity to apply. Then, as the court of appeals observed, "we will learn whether Preferred is in fact 'ready, willing and able' to operate a cable system . . . . [I]f Preferred fails to participate we will know it has suffered no injury from the franchise scheme." *Id.* at A66. The court further noted that "[a]lternatively, Preferred may apply but be denied the franchise on the basis that it lacks the requisite technical or financial qualifications. Again, if that's so, Preferred will lack standing to proceed with this litigation." *Id.* Alternatively, "the franchise may also be awarded to another operator who makes a more attractive bid, in which case Preferred will have no standing to challenge any of the restrictions placed on that franchisee." *Id.* at A67. The court also noted that "the auction may result in the award of a franchise to Preferred. . . . If that happens, then all of Preferred's claims for injunctive relief will become moot." *Id.*

Only one scenario would result in further constitutional litigation: "It's also possible Preferred will be denied a

franchise because it failed to satisfy one of the disputed requirements; in that case, we will be able to review the requirement's constitutionality without having to speculate as to its operation or relation to the overall scheme." *Id.*

The court of appeals was clearly, and wisely, hesitant about deciding important constitutional questions in this case when it had yet to "learn whether Preferred is in fact 'ready, willing and able' to operate a cable system . . ." Pet. App. at A66-67. The Court should be equally hesitant, and should deny the Petition.

5. *The Court Should Not Attempt to Address Constitutional Issues In A Case Where Petitioner's Standing Is Marginal At Best.* Respondents contend that Preferred lacks standing, and have filed a Conditional Cross-Petition raising this issue. *See* Cross-Petition in No. 93-1759 at i, 3-4, & 10-14. The standing claim rests on undisputed record evidence establishing that Preferred has none of the characteristics of a bona fide business enterprise. For example, Preferred has no books or records of account, annual reports, profit and loss statements, financial reports, financial statements, budgets, or prospectuses. Cross-Pet. App. 2a. Its only "assets" consist of a "loan" by two of its principals, and an "investment" by friends; neither "asset" is evidenced by any documentation. *Id.*

Neither Preferred nor its principals have ever constructed, owned or operated a cable system. Nor, indeed, have they ever constructed, owned or operated any other type of business related to television. Moreover, Preferred has not entered into any contracts for the planning or construction of the cable system it says it wants to build, or retained any consultants to assist it. Nor has it determined what the anticipated capital costs, operating costs or revenues of its allegedly planned system would be. *Id.* at 2a-3a. Indeed, Preferred was formed just two months before bringing this lawsuit, and it has never applied to the City for a franchise.

While the court of appeals held that these deficiencies do not deprive Preferred of standing, the fact remains that

they have played a key role in shaping the record. Thus, despite ten years of litigation, the court of appeals concluded that review of the City's "franchising requirements is at best difficult and at worst advisory, because Preferred did not participate in the 1982 NOS and has never actually applied for a South Central cable franchise." Pet. App. at A65. This faulty record, and the fact that Preferred's standing can, at best, be characterized as marginal, are yet additional reasons why the Court should not attempt to consider important constitutional issues in the largely speculative context of this case.

6. *The Court of Appeals Correctly Upheld The City's NOS Process.* The court of appeals' decision upholding the City's NOS process is clearly correct. In arguing to the contrary, Petitioner overlooks three critical facts. *First*, the NOS process does not single out cable television or any other so-called distributor of "electronic speech." On the contrary, the process is based on City Ordinance No. 58,200, enacted in 1927, and has been consistently applied to a variety of similarly situated non-transient users of City streets and rights-of-way whose activities have nothing to do with speech, such as street railroads, water, gas and electric utilities, pipeline companies, taxicab companies and non-cable communications line companies.[10]

Thus, the NOS process is simply a requirement of general applicability imposed on all similarly-situated users of City rights-of-way.[11] In urging that cable operators are

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[10] *See* Cross-Petition at 6-8. Thus, *amici's* assertion that utilities, "ordinary businesses," and other rights-of-way users are somehow immune is simply incorrect. *See* Amicus Br. at 17.

[11] Petitioner, joined by *amici*, attempts to obfuscate this point by citing articles alleging abuses by individual local officials in the cable franchising process in other jurisdictions. Pet. at 22-23 & n.34; Amicus Br. at 11 & n.11. As an initial matter, neither Petitioner nor *amici* inform the Court that two of the sources quoted, Messrs. Lee and Hazlett, were expert witnesses hired by Preferred (CR 346; CR 376), and another is a cable industry

entitled to some special, preferential exemption from this process, it is Petitioner, not the City, that urges departure from the Court's precedents. As the Court has made clear, businesses like cable operators that happen to engage in some First Amendment activities enjoy no "special protection from governmental regulations of general applicability simply by virtue of their First Amendment activities." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986). *Accord Leathers v. Medlock*, 499 U.S. at 443-47.

Second, the record here establishes that installation and operation of a cable system necessitates the ongoing, street-by-street occupation of City streets and rights-of-way with hundreds of miles of cable plant. *See* Cross-Petition at 4-5. Common sense dooms Petitioner's attempts to equate such comprehensive appropriation of public property for private use with the relatively minor, transient use of a sidewalk, a quintessential public forum, at issue in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750

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attorney. Moreover, on their face, these unsupported allegations have nothing to do with Los Angeles. They are therefore irrelevant to the constitutionality of the City's NOS process. The Court should no more strike down the City's generally applicable NOS process because of the hypothetical possibility of abuse by individual officials than it should strike down the Internal Revenue Code due to the hypothetical possibility of abuse by individual federal officials in using it to harass publishers. The proper avenue for relief in such instances is to challenge such abuses as they occur on an as applied basis. *Cf. City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 761 (1988) (laws of general application that do not single out First Amendment activities usually not subject to facial challenge).

Similarly, Petitioner criticizes the "contractual" nature of the City's NOS process. Pet. at 14 & n.33. But in light of the fact that a cable system inherently makes long term, ongoing use of City property, there is nothing surprising or suspect about the contractual nature of a franchise. Indeed, under California law, that is what a franchise is: A negotiated contract between a private enterprise and a governmental entity for long-term use of public property. *See Santa Barbara County Taxpayers Ass'n v. Board of Supervisors*, 209 Cal. App. 3d 940, 949 (1989).

(1988).[12] Pet. at 19-20. In claiming that the First Amendment somehow guarantees a right to a speedy and favorable decision permitting it to install hundreds of miles of private plant on public property, Petitioner essentially claims the perpetual right to consume public property to communicate at all times and all places in the manner it chooses. As this Court has made clear, however, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981).

Third, the City's NOS process bears no resemblance to the standardless, discretionary process struck down in *Lakewood*. As an initial matter, the Lakewood ordinance gave the mayor sole discretion to deny permits, with no standards and no required justification. *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. at 769. The City's NOS process, on the other hand, establishes detailed criteria and requires duly noticed public hearings and public input at numerous stages. Cross-Petition at 7-8. Moreover, while the Lakewood ordinance vested essentially unreviewable discretion in a single individual, the City's NOS process requires justification based on the NOS criteria, and is independently acted on by the Board of Telecom-

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[12] The cases cited by *amici* are also inapposite since they too address only minor or transient uses of a traditional public forum or, in some cases, regulation of speech activity making no use of public property at all. Amicus Br. at 5-8 (citing, *e.g.*, *Lakewood; Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395 (1992) (assembly and parade ordinance); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) (content-based newsrack regulation); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (municipal regulation of adult-oriented businesses making no use of public property); *Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781 (1988) (regulation of charitable solicitation making no use of public property); *Saia v. New York*, 334 U.S. 558 (1948) (transient loudspeakers); *Schneider v. New Jersey*, 308 U.S. 147 (1939) (handbill distribution)).

munications Commissioners (a board comprised of Los Angeles residents), as well as the City Council and the Mayor, each acting separately in turn in public session. *Id.* In addition, the Lakewood ordinance restricted minimally disruptive use of a traditional public forum, while the City's NOS process regulates much more pervasive and disruptive use of property to which access has always been restricted. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. at 813-15. Finally, the Lakewood ordinance required annual license reapplications, heightening the risk that the mayor's decision might be based on the previous year's editorial decisions. Here, however, the NOS process results in extended franchises, which must be renewed unless the City can meet the stringent renewal criteria of the Cable Communications Policy Act of 1984, 47 U.S.C. § 546.

Unlike the ordinances challenged in *Lakewood* or in the cases cited by *amici*, the City's NOS process is governed not only by the City's own requirements, but by a strict overlay of federal standards and limitations set forth in the federal Cable Act, 47 U.S.C. §§ 521 *et seq.* In addition to limiting the circumstances in which a municipality may not renew a cable franchise, the Cable Act, for example, prohibits a municipality from granting exclusive franchises and from unreasonably refusing to grant a franchise. 47 U.S.C. § 541(a)(1). Moreover, contrary to Petitioner's repeated assertions that the City makes franchise decisions based on a franchise applicant's proposed programming (Pet. at 13-14, 21), the Cable Act flatly prohibits such content-based decisions.[13] *E.g.*,

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[13] Preferred's repeated assertions illustrate the problems in this case created by Preferred's marginal standing. In its 1982 NOS for South Central Los Angeles issued prior to enactment of the Cable Act, the City did require applicants for cable franchises to list the channels they anticipated carrying. Preferred, however, did not exist at the time, and thus was not injured. The 1984 Cable Act subsequently prohibited the practice. Preferred is thus asking the Court to devote its time to a wholly moot issue: The constitu-

47 U.S.C. §§ 544(b)(1) & 546(c)(1)(B). Read together with the federal Cable Act, as it must be, the City's NOS process is a far cry indeed from the ordinances struck down in *Lakewood* and similar cases.

In sum, the court of appeals' decision upholding the NOS process is clearly consistent with the Court's precedent, and presents no occasion for the Court's review.[14]

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tionality of a practice already prohibited by federal statute, which the City has not engaged in for over a decade.

[14] *Amici* would have the Court go far beyond both the record and the questions presented by Petitioner, and venture into advisory opinions on a range of issues posed by modern communications technologies. Indeed, *amici* treat this case as a sort of Rorschach inkblot test, seeing in it all manner of First Amendment issues relating not only to the federal Cable Act, but the Communications Act of 1934 as well. *See* Amicus Br. at 2, 9-12 (questioning, *inter alia*, 47 U.S.C. §§ 214, 301, 309(a), 531(b), 533(b), 542, 544(b)(1), and 544(b)(2)).

Since the questions presented involve only the constitutionality of a process required by municipal ordinance, this case would be a singularly inappropriate vehicle for addressing the broad range of federal statutory policy issues raised by *amici*. That is particularly true since the Court would have to address those issues in a vacuum, as the court of appeals explicitly declined to reach any of the specific City franchising requirements to which the Cable Act provisions cited by *amici* even arguably relate.

An example will prove the point. *Amici* characterize the franchise fee authorized by 47 U.S.C. § 542 as a "tax" and a "special fee" that "single[s] out cable television" and that "bear[s] no relation to any costs [operators] might impose on public streets and rights-of-way." Amicus Br. at 9, n.8, & 11. As an initial matter, *amici* overlook the fact that the court of appeals declined to address the franchise fee issue (or any other specific franchise requirement) for fear "of rendering advisory opinions poorly disguised as sweeping dicta." Pet. App. at A68. Moreover, *amici's* franchise fee argument rests entirely on their apparent ignorance of (1) the record, which reveals that the franchise fee is designed to compensate for a franchisee's use of public property and is a generally applicable fee assessed on all City franchisees, cable and non-cable alike (CR 452 at ¶ 12; CR 450 at ¶ 12; CR 455 at ¶ 6; CR 444 at ¶ 10); and (2) applicable law, which makes plain that a franchise fee is not a tax but is a charge for use of public

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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May 1994

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property. *E.g., Pacific Tel. & Tel. Co. v. City of Los Angeles*, 44 Cal.2d 272 (1955). In short, the Court should decline *amici's* invitation to consider hypothetical questions that are far removed from the questions presented and the record in this case.

APPENDIX

CALIFORNIA GOVERNMENT CODE

§ 53066. Community antenna television system

(a) Any city or county or city and county in the State of California may, pursuant to such provisions as may be prescribed by its governing body, authorize by franchise or license the construction of a community antenna television system. In connection therewith, the governing body may prescribe such rules and regulations as it deems advisable to protect the individual subscribers to the services of such community antenna television system.

(b) The award of the franchise or license may be made on the basis of quality of service, rates to the subscriber, income to the city, county or city and county, experience and financial responsibility of the applicant plus any other consideration that will safeguard the local public interest, rather than a cash auction bid.

(c) The maximum franchise fee for any franchise or license hereafter awarded pursuant to this section or pursuant to any ordinance adopted under authority of this section by any city or county or city and county shall be 5 percent of the grantee's gross receipts from its operations within such city or county or city and county. Intrastate telecommunications services subject to taxation under Part 22 (commencing with Section 44000) of Division 2 of the Revenue and Taxation Code shall not be included, prior to July 1, 1988, in the gross receipts subject to any cable televsion franchise fee.

(d) Any cable television franchise or license awarded by a city or county or city and county pursuant to this section may authorize the grantee thereof to place wires, conduits and appurtenances for the community antenna television system along or across such public streets, highways, alleys, public properties, or public easements of

said city or county or city and county. Public easements, as used in this section, shall include but shall not be limited to any easement created by dedication to the city or county or city and county for public utility purposes or any other purpose whatsoever.

(e) No person may commence the construction of a cable television system without a franchise or license granted by the city, county, or city and county in which the cable television system will operate.

CALIFORNIA GOVERNMENT CODE

§ 53066.3. Considerations for granting additional cable television franchises

(a) If a city, county, or city and county elects to grant an additional cable television franchise in an area where a franchise has already been granted to a cable television operator, it shall do so only after a public hearing noticed pursuant to Section 6066, in a newspaper of general circulation as defined in Section 6000, where all of the following have been considered:

(1) Whether there will be significant positive or negative impacts on the community being served.

(2) Whether there will be an unreasonable adverse economic or aesthetic impact upon public or private property within the area.

(3) Whether there will be an unreasonable disruption or inconvenience to existing users, or any adverse effect on future use, of utility poles, public easements, and the public rights-of-way contrary to the intent of Section 767.5 of the Public Utilities Code.

(4) Whether the franchise applicant has the technical and financial ability to perform.

(5) Whether there is any impact on the franchising authority's interest in having universal cable service.

(6) Whether other societal interests generally considered by franchising authorities will be met.

(7) Whether the operation of an additional cable television system in the community is economically feasible.

(8) Such other additional matters, both procedural and substantive, as the franchising authority may determine to be relevant.

(b) Nothing in this section prevents any city, county, or city and county from considering the approval or denial

of an additional cable service franchise in any area of the city, county, or city and county, subject to compliance with subdivision (d), or the imposing of additional terms and conditions upon the granting of the franchise, as the city, county, or city and county determines is necessary or appropriate.

(c) The city, county, or city and county shall make a final determination as to whether to grant the additional franchise within six months of the application date unless the jurisdiction can establish that the applicant has unreasonably delayed proceedings designed to consider the matters set forth in paragraphs (1) to (8), inclusive, of subdivision (a).

(d) Any additional franchise granted to provide cable television service in an area in which a franchise has already been granted and where an existing cable operator is providing service or certifies to the franchising authority that it is ready, willing, and able to provide service, shall require the franchisee to wire and serve the same geographical area within a reasonable time and in a sequence which does not discriminate against lower income or minority residents, and shall contain the same public, educational, and governmental access requirements that are set forth in the existing franchise. This subdivision does not apply where all existing cable operators certify to the franchising authority that they do not intend to provide service within a reasonable time to the area to be initially served by the additional franchise.

(3)

Supreme Court, U.S.
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No. 93-1570

IN THE
Supreme Court of the United States
October Term, 1993

PREFERRED COMMUNICATIONS, INC.,
Petitioner,

v.

CITY OF LOS ANGELES and DEPARTMENT OF WATER & POWER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF UNITED STATES TELEPHONE ASSOCIATION AND BELL ATLANTIC CORPORATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[*]

Amici curiae Bell Atlantic Corporation and the United States Telephone Association submit this brief in support of both the petition for *certiorari* filed by Preferred Communications, Inc. and the cross-petition filed by the City of Los Angeles.

Bell Atlantic provides telecommunications services and products to the general public, including the carriage of voice, data, and video services over its local telephone network subject to regulation as a common carrier under state laws and the federal Communications Act of 1934. In addition, Bell Atlantic recently prevailed in a constitutional challenge to 47 U.S.C. § 533(b), which prohibits telephone companies from providing "video programming" directly to subscribers within their telephone service areas. *Chesapeake & Potomac Telephone Co. of Virginia v. United States*, 830 F. Supp. 909 (E.D. Va. 1993), *appeal pending*, Nos. 93-2340, 93-2341 (4th Cir.) (filed Oct. 15, 1993). Therefore, Bell Atlantic is an electronic speaker in its own right, as well as a transporter of the voice, video, data, and graphics messages of others.

The United States Telephone Association is a membership corporation of over eleven hundred domestic local exchange telephone companies. The association's members provide over 98% of the local telephone access lines in the United States. Bell Atlantic, for example, is a member of the United States Telephone Association.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has already made clear that video programming is constitutionally protected expression. *See Leathers v. Medlock*, 499 U.S. 439, ___, 111 S. Ct. 1438, 1442 (1991); *City of Los Angeles v. Preferred*

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[*] Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clerk of the Court.

Communications, Inc., 476 U.S. 488, 494 (1986). This case gives the Court the opportunity to clarify how the First Amendment applies to speakers who use facilities along public streets and rights of way to distribute information in electronic rather than printed form.

In *Turner Broadcasting System, Inc. v. FCC*, Nos. 93-44, 93-45, this Court is considering the constitutionality of the "must-carry" rules contained in 47 U.S.C. §§ 534 and 535, which require cable operators to transmit the programming of commercial and noncommercial broadcast stations over their cable systems. The instant case is a logical successor to *Turner*. It provides an opportunity to apply the First Amendment principles governing electronic speech to a different array of regulatory activities: rules restricting the deployment of facilities necessary to communicate information from speakers to listeners.

There is enormous controversy regarding the power of municipalities to impose conditions on, and otherwise to regulate, the deployment of cable facilities. Lower courts are divided over the proper First Amendment standard for regulations of cable television and other emerging forms of electronic communication. The instant case is a microcosm illustrating the need for this Court's review: the case began in 1983, has persisted for over a decade, and has already been the subject of one plenary proceeding in this Court. Yet Preferred Communications is still seeking the government permit that will enable it to speak to its chosen audience. The questions presented here will not go away. The need for this Court's guidance will only increase. And the constitutional issues raised by this case have already been thoroughly aired in many lower courts and are fully ripe for this Court's review.

I. The Court should grant the petition for *certiorari* filed by Preferred Communications in order to clarify the constitutional standards that apply to the distribution of electronic speech. In particular, the Court should clarify that

three fundamental First Amendment principles developed in the context of the distribution of print and other types of speech should govern the distribution of information in electronic form:

(1) Schemes providing for the administrative regulation of speech must contain "'narrowly drawn, reasonable and definite standards'" to constrain the decisionmaker's discretion. *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2402 (1992) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)).

(2) Such schemes must include reasonable time limits within which the decisionmaker is required to act.

(3) Any restriction on the deployment of facilities used for electronic speech must be both narrowly tailored to the Government's regulatory objective and possess an essential nexus to the particular facilities in question.

The importance of articulating these principles is underscored by the First Amendment abuses that are reflected in the record of this case and that are a common characteristic of the procedures by which local governments grant cable franchises. The franchise process routinely imposes virtually no limits on the discretion of local government officials and no meaningful time limits for action. The result is that cable operators can obtain the permits they need to speak only if they accept onerous conditions that are wholly unrelated to any legitimate governmental interest. Common examples of these conditions range from providing free services and facilities for the use of local governments to providing local officials a special channel over which they can transmit their own chosen messages to voters — an information-age equivalent of the franking privilege.

Moreover, this type of standardless administrative control of protected expression is not limited to cable television. For example, the FCC has asserted authority to regulate telephone company facilities used to deliver video speech as required by

"public convenience and necessity." Satellite technologies used to distribute video programming are subject to a similar standard. The breadth of this problem makes the need for this Court's review all the more acute.

II. The Court should also grant the cross-petition filed by the City of Los Angeles in order to establish, once and for all, that the First Amendment does not permit municipalities to grant exclusive franchises to incumbent cable companies. This Court's review is necessary because the lower courts are divided over the question, although the weight of authority would hold that the First Amendment prevents municipalities from banning a second speaker. While the 1992 Cable Act limited the power of local officials to grant exclusive franchises, it did not solve the problem — as illustrated by Los Angeles' refusal to consider another application for a cable franchise until the intervention of the Ninth Circuit.

Moreover, this Court's review is essential, because the speech at issue is video programming — the most pervasive form of communication in America today and the contemporary equivalent of the handbill, newspaper, and live entertainment source rolled into one. This Court should make clear that regulations impairing the practical ability of speakers and audiences to participate fully in such an important medium properly trigger the most searching constitutional scrutiny. *See City of Ladue v. Gilleo*, No. 92-1856 (argued Feb. 23, 1994); *Lee v. International Soc'y for Krishna Consciousness, Inc.*, 112 S. Ct. 2709, 2710 (1992) (*per curiam*); *Schneider v. State*, 308 U.S. 147, 162 (1939). The justifications proffered by the City of Los Angeles and other municipalities are woefully inadequate to warrant a ban on competing speakers.

REASONS FOR GRANTING THE WRIT

I. THIS CASE OFFERS A VALUABLE OPPORTUNITY TO CLARIFY THE FIRST AMENDMENT PRINCIPLES APPLICABLE TO ADMINISTRATIVE SCHEMES THAT LICENSE THE DEPLOYMENT OF FACILITIES NECESSARY FOR ELECTRONIC SPEECH

This Court has always subjected to full First Amendment scrutiny laws that deprive speakers of the channels of communication they need to deliver their messages to their chosen audiences.[1] This Court should do no less with respect to cable television and other forms of electronic speech. The wires and cables that carry electronic information are the arteries of expression, without which speakers could not communicate with willing listeners.

To be sure, we do not maintain that Government is completely disabled from regulating the deployment of the facilities necessary to transmit electronic speech — any more than the Government is wholly disabled from regulating the movement of sound trucks on public streets,[2] the placement

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[1] For example, this Court has applied First Amendment scrutiny to laws regulating publishers' ability to distribute their newspapers, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) ("use tax" on cost of paper and ink products consumed in publishing process); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) (regulation of newsracks); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988) (same); to laws prohibiting the use of loudspeakers, *Saia v. New York*, 334 U.S. 558 (1948); and to laws regulating the physical distribution of handbills. *Schneider v. New Jersey*, 308 U.S. 147 (1939).

[2] *See Kovacs v. Cooper*, 336 U.S. 77 (1949).

newsracks on public sidewalks,[3] the operation of sound equipment in public parks,[4] or any other activities of special First Amendment significance. But we do submit, and believe it to be a fundamental proposition worthy of this Court's plenary consideration, that familiar First Amendment principles should govern administrative schemes that license the deployment of facilities necessary for electronic speech:

(1) Foremost among these free speech principles is the precept that administrative discretion must be carefully limited. The First Amendment forbids government from "vest[ing] restraining control over the right to speak [in] an administrative official where there are no appropriate standards to guide his action." *Kunz v. New York*, 340 U.S. 290, 295 (1951).[5] Thus, in *City of Lakewood v. Plain Dealer*

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[3] *See City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988).

[4] *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

[5] *See, e.g., Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2402-03 (1992) (striking down assembly and parade ordinance that permitted a government administrator to vary the fee to reflect the estimated cost of maintaining public order, on the ground that there were "no articulated standards either in the ordinance or in the county's established practice"); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-226 (1990) ("a scheme that places 'unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship'") (quoting *City of Lakewood*, 486 U.S. at 757); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 964 n.12 (1984) ("a statute that requires ... a 'license' for the dissemination of ideas is inherently suspect. By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech."); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1969) ("in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals, or convenience.' This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this

Publishing Co., 486 U.S. 750 (1988), the Court held invalid on its face an ordinance that gave a mayor untrammelled power to grant or deny applications for annual permits to place newsracks on public property, even though such newsracks necessarily burden the streets and other public areas with clutter, litter, and other inconveniences. The Court explained that, "[w]ithout ... guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *Id.* at 758.[6]

In *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), this Court invalidated a city regulation of newsracks on public property that permitted them to be used for distributing newspapers but not commercial handbills. Although the Court accepted that the city was "[m]otivated by its interest in the safety and attractive appearance of its streets and sidewalks," *id.* at 1507, the Court noted that the city's regulatory scheme raised the same concerns as the ordinance struck down in *Lakewood* — in particular, that it did not contain a clear and explicit limit on the scope of the decisionmaker's discretion. 113 S. Ct. at 1513 n.19.

(2) The second salient principle is what this Court has

Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.").

[6] Even the dissenters agreed that "certain licensing laws that '[g]iv[e] a government official ... substantial power to discriminate based on the content or viewpoint of speech' are unconstitutional on their face — without any showing of actual censorship or discrimination, or even without the potential licensee even making an application for a license." 486 U.S. at 774 (White, J., joined by Stevens and O'Connor, JJ., dissenting) (quoting the majority opinion, 486 U.S. at 759).

described as "[t]he core policy underlying" *Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965) — "that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990).[7]

Thus, administrative schemes that license the deployment of facilities for video programming and other electronic speech must ensure that decisions are made within "a reasonable period of time." There must be time limits within which the decisionmaker is required to act, and applications must not be allowed to languish for an indefinite period.

(3) Finally, any restriction on facilities needed for electronic speech must, at an absolute minimum, be narrowly tailored to the Government's regulatory objective and must possess a close nexus to the particular facilities that are the object of regulation. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837-38 (1987); *Dolan v. Tigard*, No. 93-518 (argued Mar. 23, 1994).

These three First Amendment principles are settled law in the context of the distribution of written materials. This Court should grant *certiorari* to clarify that the principles extend as well to administrative schemes licensing the deployment of facilities necessary for electronic speech.

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[7] *See also Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781, 802 (1988) (holding that scheme failing to provide for definite limitations on the time within which administrative agency must act was constitutionally unsound because the "delay compelled the speaker's silence"); *City of Lakewood*, 486 U.S. at 771 ("Nowhere in the ordinance is either [the mayor or the city council] required to act with reasonable dispatch. Rather, an application could languish indefinitely before the Council, with the Newspaper's only judicial remedy being a petition for mandamus"); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980) (invalidating statute on ground that it restrained speech for an "indefinite duration").

This case is a good vehicle to review that question. Federal law provides that "a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b)(1). Los Angeles acknowledges that its cable franchising process "is similar in all material respects to the process by which most municipalities and counties across the nation have granted cable franchises." Cross-Petition at 8. Yet, as Preferred Communications explains, there are no guidelines for, or limitations on, the exercise of the vast administrative discretion afforded by the franchise process.

Although the 1992 Cable Act purports to limit the power of cities and localities to grant exclusive franchises, it nonetheless permits them to "refuse to award an additional competitive franchise" unless refusal to do so would be "unreasonable." 47 U.S.C. § 541(a)(1). In addition, federal law grants local officials broad authority to require, as a condition of holding a franchise, that cable operators pay a special franchise fee, in addition to taxes, fees, and other assessments of general applicability, *id.* at § 542(a);[8] "that channel capacity be designated for public, educational, or governmental use, and channel capacity or institutional networks be designated for educational or governmental use," *id.* at § 531(b); and that cable operators comply with

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[8] The power to tax is of course "the power to destroy," *McCullough v. Maryland*, 4 Wheat. 316, 431 (1819), and this Court has recognized the First Amendment risk posed by laws that are not generally applicable taxes but rather are special assessments singling out cable television for unique burdens. *E.g.*, *Leathers v. Medlock*, 499 U.S. 439 (1991). Moreover, the danger of the authority to levy fees is heightened by decisions such as *Erie Telecommunications, Inc. v. Erie*, 659 F. Supp. 580 (W.D. Pa. 1987). There, the court held that a cable television company was estopped from arguing that the municipality's fees exceeded those allowed by law, on the ground that the company had "accepted" the terms of the agreement. The court rejected the company's argument that it faced a Hobson's choice, since failing to agree to the municipality's terms would have resulted in the loss of the ability to use public rights-of-way, at least while litigation was pending.

"requirements for facilities and equipment" for use by local governments. *Id.* at § 544(b)(1). Moreover, cities and localities "may enforce any requirements contained within the franchise (A) for facilities and equipment, and (B) for broad categories of video programming or other services." *Id.* at § 544(b)(2).[9]

The latitude afforded local franchising authorities, and the absence of *any* meaningful time limits, has politicized the process by which local governments determine what speech their citizens will receive through the nation's most important medium of communication — a result that is anathema under the First Amendment. As one expert has observed, "virtually all franchising decisions are intensely political. . . . [and] generally entail[] subjective judgments that violate the first amendment." Lee, *Cable Franchising and the First Amendment*, 36 Vand. L. Rev. 867, 870-71 (1983).

More fundamentally, contemporary franchise requirements quite plainly do not satisfy the familiar First Amendment principles for the administrative regulation of

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[9] Lower court decisions illustrate the risk of subtle content discrimination that may be hard to detect but is real nonetheless and worthy of First Amendment concern. For example, in *Chicago Cable Communications v. Chicago Cable Comm'n*, 678 F. Supp. 734 (N.D. Ill. 1988), the district court held that a local cable television commission did not violate 47 U.S.C. § 544 by fining a cable operator for failing to comply with franchise requirements for local origination programming, which demanded that the operator broadcast a certain number of hours of programming per week developed specifically for viewers in Chicago. On appeal, the Seventh Circuit sustained the local origination requirement against a First Amendment challenge. 879 F.2d 1540 (7th Cir. 1989). The court of appeals noted that this Court "has yet to determine the applicable standard of review of a challenge to a municipal regulation of cable television." *Id.* at 1548. Nonetheless, the court of appeals upheld the local origination rule under the test of *United States v. O'Brien*, 391 U.S. 367, 377 (1968), concluding that "it is within the City's rights, arguably its responsibilities, to proffer some requirements guaranteeing that the cable customers are, to the extent possible, accorded a range of programming from the franchisee." 879 F.2d at 1550.

speech. For example, a municipality could not permissibly license bookstores, newspapers, or magazines in the interest of public convenience and necessity.[10] A city could not constitutionally mandate, as a condition of a newspaper's operation within city limits, that the newspaper turn over a portion of its front page for use by the city officials, or that the newspaper deliver each week self-serving bulletins from the city's mayor to the newspaper's readers. *See, e.g., Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

Yet cable companies are routinely required, as a condition of their franchises, to finance the construction of municipally controlled television studios, to deliver free production equipment to city officials and institutions, and to give city officials absolute programming control over certain channels.[11] In addition, the "franchise fees" that cable operators are required to pay almost never bear any relation to the costs they might impose on public streets and rights-of-way. This sharp departure from settled principles of free speech reflects an unexplained, and disturbing, leap in First Amendment logic and merits this Court's plenary review.

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[10] The history of the licensing of written expression only highlights the need not to make the same mistake with respect to electronic speech. Shortly after mechanical printing arrived in England, Henry VIII sought to suppress it, fearing its persuasive power, and in 1530 established a licensing system for printers. For the next century, at least, the system of licensing with its monopoly rents gave the Crown considerable power to promote the circulation of works favorable to his religious and political policies and kept the press in England under the control of the monarch. *See* J. Emord, *Freedom, Technology, and the First Amendment* 26 (1991); F. Siebert, *Freedom of the Press in England: 1476-1776*, at 46 (1965); L. Levy, *Emergence of a Free Press* 12-13 (1985).

[11] *See, e.g.*, Saylor, *Municipal Ripoff: The Unconstitutionality of Cable Television Franchise Fees and Access Support Payments*, 35 Catholic L. Rev. 671, 672 (1986) ("The list of such obligations goes on, reflecting the remarkable ingenuity of cities and their consultants in devising schemes for pet 'public interest' projects out of cable companies' and subscribers' money").

The question is all the more important because municipal cable franchise rules provide only one example of the administrative schemes that regulate the distribution of electronic speech. The Federal Communications Commission (FCC), for instance, asserts authority under the Communications Act to regulate the deployment of facilities used to deliver video speech by requiring telephone companies to obtain certificates of "public convenience and necessity." 47 U.S.C. § 214. The Act delegates to the Commission sweeping discretion to grant or deny such certificates or to impose essentially any "terms and conditions as in its judgment the public convenience and necessity may require." *Id.* at § 214(c).

Similarly, direct broadcast satellite services — which can transmit hundreds of channels of video speech to viewers — must obtain government licenses pursuant to 47 U.S.C. § 301. Yet the only "standard" governing the review of an application is "whether the public interest, convenience, and necessity will be served by the granting of such application." *Id.* at § 309(a).

The breadth of the administrative control currently exercised over the means of distributing electronic speech emphasizes the need to clarify the requirements imposed by the First Amendment on administrative schemes regulating such expression.

II. THIS CASE ALSO PROVIDES A VALUABLE OPPORTUNITY TO DECIDE WHETHER THE FIRST AMENDMENT PERMITS MUNICIPALITIES TO SILENCE SPEECH AND REDUCE COMPETITION BY GRANTING EXCLUSIVE CABLE FRANCHISES

In its cross-petition, the City of Los Angeles asserts that a municipality may deny would-be speakers the opportunity to compete with the incumbent cable company by refusing to grant needed franchises. We respectfully submit that the City is wrong, but we wholeheartedly agree with Los Angeles that

the issue is an important one worthy of this Court's review.

First, although the more recent and better-reasoned decisions have concluded that the First Amendment precludes municipal bans on additional competitive franchises, the lower courts are nonetheless divided over the matter. We agree with the City of Los Angeles that this Court's review is urgently needed.

Several courts have agreed with the Ninth Circuit below that "'allowing only the single company selected through the franchise auction process to erect and operate a cable system in each region' exacts too heavy a toll on the First Amendment interests at stake here. Competition in the marketplace of ideas — as in every other market — leads to a far greater diversity of viewpoints (and better service) than if a single vendor is granted a crown monopoly." A60-61 (quoting *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1406 (9th Cir. 1985) (*Preferred I*), *aff'd on narrower grounds*, 476 U.S. 488 (1986)).[12] Other

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[12] *See Cox Cable Communications, Inc. v. United States*, 774 F. Supp. 633, 637 (M.D. Ga. 1991) (invalidating exclusive franchise on First Amendment grounds; explaining that "cable television is entitled to the same first amendment protection as newspapers"; and holding that, while "[c]oncerns about disruptions of the public domain do allow a government to make reasonable restrictions on the time, place, and manner of the disruptions," a second provider could not be excluded automatically), *remanded on other grounds*, 992 F.2d 1178 (11th Cir. 1993); *Jones Intercable of San Diego, Inc. v. City of Lake Elsinore*, No. SACV 90-636-GLT (C.D. Cal. Apr. 4, 1991) (ordering city to issue competing cable company a franchise license, explaining that "[p]laintiff is a First Amendment 'speaker,' entitled to a high degree of constitutional protection," and that "[a]lthough the city has suggested that there will be physical disruption of the public domain, there is insufficient showing to suggest that plaintiff's franchise should be totally denied for this reason. Reasonable time, place, and manner restrictions, together with appropriate bond and insurance requirements, can remedy this potential harm"); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954, 966-67 (N.D. Cal. 1987) (holding that First Amendment did permit city to adopt measures to minimize disruption to public streets, but that First Amendment precluded city from adopting regulation providing only for a single cable television

courts have disagreed.[13]

Second, this Court should grant review because of the importance of the First Amendment rights at issue. For better or worse, electronic speech, particularly in the form of video programming, is the principal means by which most Americans receive news, political opinion, entertainment, and other forms of information. More households have televisions than subscribe to newspapers.[14] The average television household watches television seven hours per day, whereas the average newspaper receives only 45 minutes of attention.[15]

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operator); *see also Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1450 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (noting that "the Supreme Court has categorically rejected the suggestion that purely economic constraints on the number of voices available in a given community justify otherwise unwarranted intrusions into First Amendment rights" (citing *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974)); *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1112-13 (D. Utah 1985) (rejecting application of broadcast precedents like *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), to cable television), *aff'd*, 800 F.2d 989 (10th Cir. 1986) (*per curiam*), *aff'd*, 480 U.S. 926 (1987).

[13] For example, in *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1378-79 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982), the Tenth Circuit vacated an injunction issued against a city's exclusive franchise policy. And in *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119, 128 (7th Cir. 1982), the Seventh Circuit upheld the denial of a preliminary injunction sought by a competing cable company against a city's exclusive franchise policy.

[14] According to the Census Bureau, 92 million households (or 98 percent of all households) have a television, in contrast to a total daily newspaper circulation of 62 million. Bureau of the Census, U.S. Dept. of Commerce, *Statistical Abstract of the United States 1992*, Table 884 (112th ed. 1992).

[15] Office of Plans and Policies, Federal Communications Comm'n, *Broadcast Television In a Multichannel Marketplace*, OPP Working Paper No. 26, at 19, 107 (June 1990); Newspaper Ass'n of America, *Facts About Newspapers '92*, at 25 (1992).

In addition, the "'power to communicate ideas through sound and visual images ... is significantly different from traditional avenues of communication because of the immediacy of the medium.'" *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) (quoting FCC Report and Order), *cert. denied*, 482 U.S. 919 (1987).

Thus, the First Amendment question here is not some academic nicety. It is the very real question of whether a multitude of willing speakers — and tens of millions of potential viewers — will be prevented from fully participating in the most important medium of communication today. In enacting the 1992 Cable Act, Congress extensively documented the harms to the system of free expression caused by restrictive franchising practices and the lack of competition in cable markets.[16] Congress limited, but did not forbid, exclusive franchises, *see* pp. 8-9, *supra*, and the 1992 Cable Act did not solve the problem — as illustrated quite concretely in the instant case by Preferred Communications' inability to secure even the *opportunity to seek* a needed franchise in Los Angeles without the intervention of the Ninth Circuit. The net result of restrictive franchising practices, in all their guises, is that the market for speech is distorted, prices are too high, and the introduction of new services is discouraged.[17]

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[16] Of the more than 10,000 communities served by cable in 1991, only 53 had two cable systems competing head-to-head. In the 1992 Cable Act, Congress specifically found that cable has become the "dominant national video medium" and that most cable operators "face[] no local competition," resulting in "undue market power for the cable operator as compared to that of consumers and video programmers." § 2(a)(2), 106 Stat. 1460. As a result, according to Congress, cable rates have increased at three times the rate of inflation since 1986. § 2(a)(1), 106 Stat. 1460.

[17] For example, the FCC has estimated that introducing competition from telephone companies "would result in significant price savings for consumers and stimulate provision of a range of new information services," with rates falling about 20 percent and subscribership increasing by 11.2 million households nationwide. Report of the Federal Communications

Third, this Court should grant review because the City's justifications for its franchise system plainly cannot pass muster under the "narrow tailoring" requirement of *United States v. O'Brien*, 391 U.S. 367, 377 (1968), and *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).[18] Los Angeles contends that competing franchises must be denied to conserve pole and conduit space. But the City conceded below that the public utility infrastructure in Los Angeles could accommodate at least one additional cable system. *See* A60, A62.

Moreover, it is obvious that the District Court, *see* A90, and the Ninth Circuit on two occasions, *see* A25, A27-A28, A60-A61, A63 n.5, both correctly found that the City's franchise requirements are not narrowly tailored to its asserted interests. Poles and conduit are owned not by cities, but by telephone companies, electric utilities, and others,[19] under

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Commission Regarding the President's Regulatory Reform Program 16 (April 28, 1992).

[18] The narrow tailoring test requires that a law not "burden substantially more speech than is necessary" to prevent the harms identified by the Government. *Ward*, 491 U.S. at 800. This Court has made clear that, under the First Amendment, the Government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993). This burden is not satisfied by "speculation or conjecture" or even by weak evidence. *Id.* The law must serve the interest in a "direct and effective" way. *Ward*, 491 U.S. at 800. If the restriction lacks a "close and substantial relation to the governmental interests asserted," it cannot survive intermediate scrutiny. *Edenfield*, 113 S. Ct. at 1802.

[19] Los Angeles claims that permitting a second cable company to lease poles and conduit would effect "a Fifth Amendment taking of that property." Cross-Petition at 15. Los Angeles also argues that the poles and conduit represent "nonpublic forums." *Id.* at 17-19. Both of these arguments assume that the *city* owns utility poles and conduit. But the properties are in fact *privately* owned by telephone companies and utilities. *See Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 22-

terms regulated by the Pole Attachment Act of 1978, 47 U.S.C. § 224.[20]

For example, long distance telephone companies, like AT&T, MCI, and Sprint, lease large quantities of pole and conduit space from Bell Atlantic. So do ordinary businesses, like retail chains that desire dedicated lines from one store to another. Yet no municipal franchise is required to engage in these activities. In fact, cable operators are the only potential lessees of pole and conduit space who must secure a franchise — a dramatically ill-fitting requirement if the franchise rules are truly intended to conserve supposedly scarce pole and conduit space.[21]

Indeed, municipal governments are significant lessees of

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23 n.1 (1986) (Marshall, J., concurring in the judgment); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 534 n.1 (1980). In addition, the Ninth Circuit explained below that, under California law, public forum analysis does not help the City's argument. A21-A28.

[20] Preferred Communications' reference to pole attachment as a "common carrier service" (Pet. at i) is a misdescription. Although regulated to some extent by the 1978 Act, pole attachments are provided pursuant to private contracts and are not "services" as that term is used in public utility law. *See FCC v. Florida Power Corp.*, 480 U.S. 245, 251-52 & n.6 (1987); *cf. Southwestern Bell Tel. Co. v. FCC*, Nos. 91-1416, *et al.* (D.C. Cir. Apr. 5, 1994) (indicating that provision of "dark fiber" — *i.e.*, provision of fiber optic lines without the necessary electronic equipment to power the fiber — is not a common carrier service but could be made available on a contractual rather than a common carrier basis).

[21] The fact that cable operators are singled out for the special burden of a franchise requirement constitutes a form of speaker-specific discrimination, which this Court has properly held triggers strict scrutiny under the First Amendment and equal protection principles. *See Buckley v. Valeo*, 424 U.S. 1, 18 (1976) (*per curiam*) (government may not "discriminate among speakers or ideas"); *Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue"); *see also Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

pole and conduit space, as they increasingly provide cable service of their own in competition with incumbent cable companies — a trend that has been both approved by the courts[22] and encouraged by Congress in the 1992 Cable Act, which exempted local governments from having to comply with their own franchise requirements.[23] All of this would be rather curious if cities truly were, as Los Angeles says, vitally concerned with "conserv[ing]" pole and conduit space for "future uses," Cross-Petition at 14, and if franchises were the means by which municipalities achieved that end.

Therefore, Los Angeles cannot satisfy its burden under the First Amendment of justifying its franchise restrictions. But we fully agree with the City's position that this Court should accept *certiorari* and resolve the issue once and for all.

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[22] *See Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 637-40 (11th Cir. 1990); *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1314-15 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 430 (1991).

[23] *See* § 7(c) of the 1992 Cable Act, 106 Stat. 1483, codified at 47 U.S.C. § 541(f).

CONCLUSION

This Court should grant Preferred Communications' petition for *certiorari* as well as the cross-petition filed by the City of Los Angeles.

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Supreme Court of the United States

October Term, 1993

PREFERRED COMMUNICATIONS, INC.,

Petitioner,

vs.

CITY OF LOS ANGELES and
DEPARTMENT OF WATER AND POWER,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITIONER

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REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Preferred Communications, Inc. (hereinafter "Preferred") hereby replies to respondents City of Los Angeles and the Department of Water and Power's (hereinafter jointly referred to as "City") Brief for Respondents in Opposition (hereinafter "City Brief"). Petitioner sees no need to burden the Court with detailed discussions of the first and sixth points argued by the City, but will respond to the four others.[1] The City's claim that the questions presented here were not raised below is simply wrong, its argument that the matter should be left to state court is disingenuous, and its points regarding standing (raised here and in its Cross-Petition[2]) are both legally and factually baseless.

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[1] The City's first point, that there is no conflict among circuits, is irrelevant. Petitions may be granted where a lower court has decided an important question of federal law which should be settled by this Court. Rule 10, Rules of the Supreme Court. Moreover, as pointed out by the Amici Curiae, a conflict does exist among circuits as to the appropriate constitutional standard to apply to cable franchising. *See*, Brief of Amicus Curiae at 13-14, and n.12 and 13.

The City's sixth point, arguing the merits of the Ninth Circuit's decision to approve the NOS (City Brief at 13-17), has been touched on throughout Preferred's Petition (*see, e.g.*, Petition at 19-22 and n.30 and 33). However, a full argument is more appropriately left for a brief on the merits. *See e.g., Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974).

[2] The City filed a Conditional Cross-Petition For a Writ of Certiorari, Case No. 93-1759, on May 5, 1994 (referred to herein as "Cross-Petition"). Plaintiff does not, in general, oppose the City's cross-petition, although, for the reasons set forth herein at point 3, there is no reason for the Court to grant certiorari on the question of standing. While the Court will assess the

None of the points raised by the City is a persuasive reason to deny Preferred's petition. This case provides a valuable opportunity for this Court to clarify the First Amendment principles applicable to municipal franchising of cable television – an area of vital importance to both the cable press and, as the City concedes (Cross-Petition at 19), to municipalities themselves.

DISCUSSION

1. The Questions Presented Are Not Being Raised For The First Time Here. The City's argument that Preferred did not raise below the issue of cable operators using rights-of-way owned by utility companies – rather than ones owned by the City – is simply wrong. Preferred has raised this point throughout the litigation, at both the trial and the appellate levels.

For example, in opposing a 1988 motion for partial summary judgment, Preferred made the point very plainly:

> . . . Plaintiff does not seek access to the use of public property for the purposes of speech. . . . Plaintiff only seeks access to the communication space on utility property . . .

(CR 193, 1-2.) The same argument was made by Preferred again and again as the case progressed at the trial level.[3] Apparently the District Court did not find the issue of sufficient legal significance to address directly in its rulings, choosing to resolve the matter on different grounds. This erroneous conclusion by the lower court, however, should not cause Preferred to lose its right to address the issue at the appellate level.

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petitioner's standing as a matter of course, the record is sufficiently clear that the Court need not direct any more attention to this issue than is usual in any case.

[3] *See, e.g.*, CR 123 at 20, n. 15; CR 343 at 8 and n.2; CR 456 at 2, n.3.

At issue here is not a question of what the facts are, but rather what is the correct law to apply to those facts.[4] If, after resolving the legal issues, the Court believes that the factual dimensions of the questions presented were not fully resolved by the District Court, there is no reason that the Court cannot either resolve them or remand the matter for further proceedings consistent with its opinion. Such a procedure is regularly followed by this Court. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983).

The City's further argument that the Court should "refrain from addressing issues not raised in the Court of Appeals" (City Brief at 6) is highly misleading, since Preferred *did* raise this issue in the Ninth Circuit, at several points.[5] Indeed, the City specifically responded to the point in its own arguments to the appellate court.[6] The Ninth Circuit's failure to address the issue does not preclude this Court from doing so.

2. The Questions Presented Involve the Application of Federal Constitutional Law. The City attempts to belittle the federal questions involved in this litigation, apparently hoping that the Court will ignore the fact that the case, including the questions presented here, concern

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[4] This Court frequently grants certiorari to determine the application of constitutional principles to factual situations. *See, e.g., Michigan v. Long*, 463 U.S. 1032 (1983) and the many other cases applying the Fourth Amendment to varying search and seizure situations.

[5] Brief of Appellant in Case No. 91-55625 (filed 9/13/91) at 7, 29, 35, and 36, n.73; Preferred's Reply/Opposition Brief in Cases No. 91-55625 and 91-55665 (filed 3/9/92) at 1, n.2 ("[Preferred] seeks only to receive 'public utility service' over *utility* easements which happen to be co-located with City right-of-way easements") and at 18, n.28.

[6] *See, e.g.*, Reply Brief of Appellees/Cross-Appellants (filed at the Ninth Circuit 4/6/92) at 2, n.1.

the federally mandated First Amendment rights of members of the press. Whatever the state statutes provide,[7] it is the responsibility of the federal courts to interpret how federal law and constitutional principles should be applied.[8] That is why this case has been before the *federal* courts, including this one, for the last 10 years.

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[7] Preferred disagrees with the City's argument that the statutes are in conflict. The supposed conflict raised by the City can generally be resolved by reading the term "franchise" as it is defined in the federal Cable Act, *i.e.*, to include a "permit, license, resolution . . . " (47 U.S.C. §522.9), issuable to those purported to abide by appropriate police power (as opposed to the contractual power resulting from the "crown monopolies" selectively granted by the discretionary and standardless municipal franchising process).

[8] The City's argument that DWP's poles are outside the scope of the questions presented is a red-herring. The issue here is how the City controls cable via controlling access to its streets and rights-of-way, not via access to the utility poles owned by the DWP, which has its own easements over public and private property for the purpose of providing public utility services. Indeed, the record shows that DWP *has* dedicated its poles to use by cable operators, just as privately-owned utility companies have, providing access to any cable company that obtains "permits, licenses or grants" required by city authorities. (CR 468, Exh. 6 at ¶10; and see Petition at 7 and n.6). The only difference for the few solely-owned DWP poles not also used by telephone, is that the rates, as opposed to such issues as safety, are not regulated by the state Public Utilities Commission. Moreover, DWP is a signator of the Southern California Joint Pole Agreement, which mandates that when poles are jointly-owned and used by power and telephone companies (which includes the vast majority of all utility poles), the telephone company is to contract with and provide space for cable operators. Thus, since in most instances DWP's poles are jointly-owned, cable television wires located on DWP poles are generally located in telephone company space, not in DWP-controlled space.

Preferred only asks this Court to deal with state law to the extent it is required to insure the protection of its free speech and press rights. Such a challenge is clearly within the bailiwick of this court, the final arbiter of all matters of federal law.[9]

3. Preferred's Standing Has Been Clearly Established. The City, in both its opposition brief and its own Cross-Petition, disputes Preferred's standing to challenge the City's franchising process. Contrary to the City's assertion, the Ninth Circuit's affirmance of Preferred's standing is legally and factually well-grounded, and the decision does not conflict with other circuits.

The City asserts that the relevant injury for standing purposes is Preferred's "inability to engage in the First Amendment activities of a cable operator" in Los Angeles. (Cross-Petition at 12.) Publishing by cable is, of course, Preferred's *ultimate* goal, but the City errs in analyzing standing solely in terms of that goal. Contrary to the City's assertions, Preferred need not prove that it will, ultimately, succeed in constructing and operating a cable television system at a profit in South Central Los Angeles as a prerequisite to maintaining this litigation.[10]

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[9] The outcome of many cases addressed by this Court turn in part on state law, but only after the Court has provided the necessary clarification of federal law, and determined the applicable constitutional principles. The City's argument that this Court's decision would not provide guidance to courts outside California ignores the existence of the federal pole attachment statute. *See*, Petition at 24-25.)

[10] As the Ninth Circuit ruled in *Preferred I*:

> PCI's action challenges the auction process itself. It has been barred from access because of its refusal to enter the bidding process and abide by the City's numerous conditions. It follows that PCI clearly alleges a real injury, fairly traceable to the challenged action of the City. If PCI is right on its First Amendment claim as we have framed it, the City has wrongfully subjected PCI to a process that fails to

Preferred's standing to challenge the City's franchising process is clearly established by the numerous "lost opportunity" cases.[11]

In *Bakke*, for example, contrary to the City's argument here, the Court did *not* require the plaintiff to demonstrate that he was likely to graduate medical school, or pass his state medical certification examination, or have a profitable medical practice (though these were undoubtedly Bakke's *ultimate* goals). Those questions relate to relief, not standing. 438 U.S. at 280 n.14.[12]

Where a challenged government practice is an absolute barrier (*i.e.*, a necessary although not necessarily sufficient condition) to the plaintiff's proceeding toward an ultimate goal, the critical standing requirement is intent on the part of the plaintiff to seek the opportunity involved. The record here shows that Preferred clearly had such intent. *Preferred III*, 13 F.3d at 1330 (*see, e.g.*, CR 174, Ex. 3 at 3; CR 191, ¶2; CR 197, §2.) Thus the Ninth

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conform to the requirements of the First Amendment. This affords PCI standing.

754 F.2d at 1402-03.

[11] *See, e.g., Regents of the University of California v. Bakke*, 438 U.S. 265, 280 n.14 (1978) ("*Bakke*"); *Bryant v. Yellen*, 447 U.S. 352, 366-67 (1980); *Preston v. Heckler*, 734 F.2d 1359, 1364-66 (9th Cir. 1984); *Legal Aid Society v. Brennan*, 608 F.2d 1319, 1335 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). *See also*, Tribe, *American Constitutional Law*, §3-18 (2d ed. 1988) (standing exists where lack of government permit denies plaintiff the "opportunity to persuade others to support desired project").

[12] *See also, CC Distributors, Inc. v. United States*, 883 F.2d 146, 150 (D.C. Cir. 1989) ("Plaintiff suffers a constitutionally cognizable injury by the loss of an *opportunity to pursue a benefit* . . . even though the plaintiff may not be able to show that it was *certain to receive* that benefit had it been accorded the lost opportunity" (emphasis in original)); *Solon Automated Services, Inc. v. United States*, 658 F.Supp. 28, 31 (D.D.C. 1987) (rejecting requirement that a plaintiff show it had a "substantial chance" of winning properly-conducted bidding procedure).

Circuit again confirmed Preferred's standing on the grounds that it had a "concrete stake in the litigation" and the invalidation of the monopoly franchising process "will have increased [Preferred's] ability to compete for the franchise, despite its inability to prove it ultimately will be awarded one." *Preferred III* at 1330-31.

The Ninth Circuit relied on *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502 (9th Cir. 1988). In that case, the court found standing for film producers who sought government certification of their films to aid in their subsequent potential distribution to foreign countries, even though foreign distribution would remain quite uncertain. The court noted the long line of cases finding standing from "a cognizable injury to [plaintiff's] ability to compete for benefits." *Id.* at 506-08.[13]

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[13] *See also, Pacific Legal Foundation v. State Energy Resources, etc., Comm'n*, 659 F.2d 903, 914-15 (9th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982) ("It is sufficient that the utilities intend to proceed if the statutes are invalidated"); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977); Tribe, *supra*, at §3-18 at 132-33 (a contrary rule would be unworkable since excluded groups would be faced with a Catch 22: the more severely and successfully exclusionary a challenged scheme is, the more difficult to find persons willing to provide funding or other participation prior to resolution of the challenge).

Indeed, the record demonstrates that a grant of governmental authorization would put Preferred in a far better position to obtain financing and consummate contracts. (CR 191, ¶¶15-19; CR 199, ¶6; CR 200, ¶¶2-5; CR 201, ¶¶8-9.)

In any event, even if the City's legal analysis were completely correct, its description of the record is inaccurate. The City's characterization of Preferred as having no greater interest in resolving the constitutionality of the City's cable franchising procedures than any member of the "world at large" (Cross-Petition at 13) defies the record. Among other things, Preferred's principals have spent $200,000 and 6,000 hours specifically seeking governmental authorization to engage in cable

Nor can a contrary inference fairly be drawn from Preferred's purported failure to take preparatory steps. (City Brief at 12; Cross-Petition at 10.) Since the City has elected to allow only one cable television company within South Central Los Angeles, *no* amount of planning would have made any difference in Preferred's attempts to obtain legal authorization. The City urges a legal regime where plaintiffs must expend large sums "planning" for no purpose other than a paper record directed toward standing. The law does not require such a charade.[14]

Contrary to the City's contention in its Cross-Petition, the Ninth Circuit's decision below is not in conflict with the Eighth Circuit's opinion in *Nor-West Cable Communications v. City of St. Paul*, 924 F.2d 741 (8th Cir), *cert. denied*, 111 S.Ct. 2853 (1991), since, as the Ninth Circuit noted below, the instant case is clearly distinguishable from *Nor-West*. In *Nor-West*, the Eighth Circuit relied upon a specific jury finding that the plaintiff "never intended to build a second cable system" (924 F.2d at 747-48), while

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television activities in Los Angeles. That alone sets them apart from members of the general public.

[14] Indeed, the law frequently excuses otherwise necessary actions, where it is demonstrated that such actions would be futile. "The law should not be construed idly to require parties to perform futile acts or to engage in empty rituals." *Northern Heel Corp. v. Compo Industries, Inc.*, 851 F.2d 456, 461 (1st Cir. 1988). *See also, Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 120 n.15 (1969) (antitrust damages available even where no patent license requested, if request would have been futile); *Hoehne v. County of San Benito*, 870 F.2d 529, 535 (9th Cir. 1989) (resubmission of development plan unnecessary before suit if facts demonstrate futility); *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 105-07 (D.C. Cir. 1986) (exhaustion of administrative remedies unnecessary where futile); *In Re Bank-America Securities Litigation*, 636 F.Supp. 419, 422 (C.D. Cal. 1986) (demand prior to filing derivative action unnecessary if futile, noting that "the law abhors useless acts").

the facts here support a different conclusion. *Preferred III*, at 1329.[15]

This case has been pending for over ten years. It has been over eight years since the Ninth Circuit's initial decision in *Preferred I*. During all of that time, the City proceeded on its way with its monopoly cable policy. The City makes the somewhat twisted argument that this passage of time has weakened whatever standing Preferred once had, since certain aspects of the City's franchising practice have changed since 1983. (City Brief at 16, n.13.) There is no indication presented, however, that the City intends to make any change to its manner of granting franchises via a discretionary auction process – the aspect of its program specifically raised in the instant Petition.[16] It has not, like the City of Sacramento, abandoned its monopoly policy in favor of an

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[15] Since the Eighth Circuit's analysis in *Nor-West* lumps intent and financial capability together, it is somewhat difficult to identify the precise basis for its holding. It may be significant for standing purposes that the plaintiff therein did not challenge any of the particulars of the monopoly franchise process, but rather simply demanded a second franchise. 924 F.2d at 743-44. *Compare, Preferred I* at 1402-03.

[16] Moreover, the City's example of how its program has changed is highly misleading, to say the least. The City implies that after the 1984 Cable Act was passed, it no longer considered the programming that franchise applicants intended to offer. (City Brief at 16, n.13.) However, in its June 1986 "Request for Renewal Proposals" (*i.e., after* the 1984 Cable Act), the City specifically required that all cable operators seeking to renew their franchise provide detailed lists of every channel of programming offered on their current systems and every channel the operator intended to offer in the larger systems required by the City if the franchise were renewed. (CR 303, Exh. HH, 115-117.) Clearly, the City did *not* abandon its practice of requiring programming information even after the Cable Act precluded its use. To date, no competition has been allowed by the City in this form of the press.

ordinance prescribing the rules applicable to all who ask for and receive cable television licenses.

The requisite adversity between the parties clearly exists in this action: PCI would benefit from decision in its favor.

Respectfully submitted,

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